Noah's Ark Processors, LLC d/b/a WR Reserve *and* United Food and Commercial Workers Local Union No. 293. Cases 14–CA–217400, 14–CA–224183, 14–CA–226096, 14–CA–231643, and 14–CA–235111

January 27, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING.

On October 11, 2019, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions,[2] cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[3]

[1] Prior to the issuance of the judge's decision, the United States District Court for the District of Nebraska granted, in large part, the Board's petition for injunctive relief filed pursuant to Sec. 10(j) of the National Labor Relations Act. See *Perez v. Noah's Ark Processors, LLC d/b/a WR Reserve*, No. 4:19-cv-3016, 2019 WL 2076793 (D. Neb. May 10, 2019). Five months later, the court granted the General Counsel's motion to hold the Respondent in contempt of court for violating the court's injunction. See *Sawyer v. Noah's Ark Processors, LLC d/b/a WR Reserve*, No. 4:19-cv-3016, 2019 WL 5268639 (D. Neb. Oct. 17, 2019).

[2] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by failing or refusing to provide the Union with relevant and necessary information since November 6, 2017; bypassing the Union and dealing directly with employees by soliciting their preferences about moving the observance of the Independence Day holiday from July 4 to 6, 2018; insisting to impasse and implementing a proposal to remove the maintenance employees from the unit, a permissive subject of bargaining; unilaterally and without the Union's consent giving effect to untimely dues check-off authorizations for the period between January 23 and 28, 2018, while a collective-bargaining agreement was still in effect; unilaterally granting a 15-cent hourly wage increase in January and again in July 2018 and by failing to obtain the Union's consent before modifying the collective-bargaining agreement to increase employees' hourly rate by 15 cents between January 23 and 28, 2018, while a collective-bargaining agreement was still in effect; and unilaterally implementing a new wage system in August 2018 without providing the Union with notice and an opportunity to bargain over the decision or its effects. In the absence of exceptions, we also adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by failing to deduct and remit dues to the Union pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations since January 23, 2018. Additionally, in the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by providing employees with pre-printed forms to resign from the Union and to revoke their dues-checkoff authorizations; soliciting employees to resign from the Union and interrogating them about their support for the Union; and coercively telling employees, in about March 2018, that there was no union at the facility, the Respondent did not allow a union at the facility, the Respondent was going to get rid of the Union, and employees can get a raise when the Respondent removes the Union.

[3] The Respondent has excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent's implementation of a new wage scale in January 2017 is outside the scope of this case, we additionally rely on the fact that the complaint alleges an unlawful change in wage rates "since January 23, 2018."

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by failing to bargain in good faith over a successor agreement, we do not rely on his citation to *Wycoff Steel*, 303 NLRB 517 (1991). There were no exceptions in that case to the judge's finding that the employer bargained in bad faith. In the absence of relevant exceptions, that decision has no precedential value on the issue for which the judge cited it in this case. See *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999). Instead, we rely on *Carpenters Local 1780*, 244 NLRB 277, 281 (1979) (finding that the respondent's chief negotiator's limited authority, which created possibilities for delay and objection, did not comport with the duty to bargain in good faith).

The Respondent excepted to the judge's findings that it violated Sec. 8(a)(1) when (i) Supervisor Jose Madrigal interrogated employees about whether they had received a Board subpoena; (ii) Supervisor Josue Guerrero interrogated employees about whether they had received a letter about the Union; and (iii) Operations Manager Paul "Pablo" Hernandez interrogated employee Aramis Hernandez-Acosta about his communications with a Board agent. However, in its supporting brief, the Respondent did not present any argument in support of these exceptions. Thus, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we find that these exceptions should be disregarded. See, e.g., *Greyhound Lines, Inc.*, 367 NLRB No. 123, slip op. at 1 fn. 2 (2019); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) when supervisor Joel Murillo interrogated employees about whether they had received a Board subpoena. Any such finding would be merely cumulative because it would not affect the Order.

The judge found that the Respondent violated Sec. 8(a)(1) when operations manager Hernandez told employee Aramis Hernandez-Acosta that it was "mandatory" that he go talk to the "company attorney" because Hernandez did not want Hernandez-Acosta to be confused or "to use a word that he didn't know how to use properly" when meeting with Board agents. In adopting that conclusion, we note that the Respondent challenges only the judge's factual finding that Hernandez made this statement, implicitly arguing that the judge should have credited Hernandez' testimony over the testimony of Hernandez-Acosta. As stated above, we find no basis for disturbing the judge's credibility determinations. We find it unnecessary to pass on the judge's additional findings that Hernandez and supervisors Murillo and Madrigal violated Sec. 8(a)(1) by requiring employees to meet with and/or use attorneys retained and compensated by the Respondent prior to and during their

and conclusions as modified and to adopt the judge's recommended Order as modified and set forth in full below.[4]

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by discharging 10 employees[5] for engaging in a protected work stoppage on March 27, 2018.[6] The judge found, and we agree, that the employees engaged in a protected concerted work stoppage to protest wage disparities.[7]

In its exceptions, the Respondent contends that the work stoppage was an unprotected wildcat strike in breach of the collective-bargaining agreement's no-strike clause, citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 63 (1975).[8] We disagree. First, the collective-bargaining agreement containing the no-strike clause expired 2 months before the employees' work stoppage. No-strike clauses do not survive contract expiration. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). Hence, the work stoppage is not rendered unprotected by virtue of the expired no-strike clause.

Second, it is well established that the Act protects some wildcat strikes, i.e., strikes unauthorized by the employees' exclusive collective-bargaining representative. See *East Chicago Rehabilitation Center*, 710 F.2d 397, 400 (4th Cir. 1983), cert. denied 465 U.S. 1065 (1983). Under extant precedent, the Board determines whether a particular wildcat strike is protected by considering (1) whether the employees were attempting to bypass their union and bargain directly with the employer, and (2) whether the employees' position was inconsistent with the union's position. *Silver State Disposal Service*, 326 NLRB 84, 85 fn. 8, 103–104 (1998)[9]; see also *CC 1 Limited Partnership v. NLRB*, 898 F.3d 26, 34 (D.C. Cir. 2018) ("[O]nly . . . employees' activity [that] undermines the [u]nion's objectives or position as bargaining authority . . . loses NLRA protection."); *Bridgeport Ambulance Service*, 302 NLRB 358, 364 (1991) (explaining that a wildcat

meetings with Board agents, as any such finding would not materially affect the remedy.

Similarly, because we agree with the judge that the Respondent violated Sec. 8(a)(5) by, among other things, refusing to provide the Union with relevant and necessary information, dealing with unit employees directly, making unilateral changes, and bargaining in bad faith, we find it unnecessary to pass on the judge's finding that the same conduct, in the aggregate, also violated Sec. 8(a)(5) by undermining the Union, as such a finding would not materially affect the remedy.

[4] We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, to conform to the Board's standard remedial language, and in accordance with our decisions in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also modify the Order to include a provision requiring the Respondent to post the notice in English and Spanish. The judge recommended that the notice be posted in both English and Spanish in the remedy section of his decision, but he inadvertently omitted from his recommended Order language giving effect to this remedy. We shall substitute a new notice to conform to the Order as modified.

[5] The discharged employees were Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright.

[6] We agree with the judge that the employees were discharged and did not abandon their jobs, as the Respondent contends. An employee may be discharged without formal words of firing. It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his or her tenure has been terminated. *Matsu Corp. d/b/a Matsu Sushi Restaurant*, 368 NLRB No. 16, slip op. at 1 fn. 2 (2019) (quoting *Nations Rent, Inc.*, 342 NLRB 179, 179–180 (2004)), enfd. mem. 819 Fed. Appx. 56 (2d Cir. 2020). As discussed in the judge's decision, operations manager Hernandez told the employees to go home if they did not want to work. He also asked a supervisor to write down the employees' names because he did not want them back in the building. Subsequently, plant manager Mike Helzer told the employees they could work the rest of their shift, and he would meet with them after work. The employees expressed that they were unwilling to do so, and at that point, Hernandez collected their identification badges. As the judge found, "[t]hese badges are used to get past the security gate, to enter the facility, and for timekeeping purposes—i.e., employees cannot work without them." The employees then asked if they could wait in the parking lot for human resources manager Lidia Acosta to arrive. Hernandez replied that they could not and that he would summon the police if they remained. Although Helzer's proposal held out the possibility of continuing employment, Hernandez' response after the employees turned Helzer down was of a piece with his earlier statements, and his demand that the employees turn in their identification badges was particularly telling. In these circumstances, prudent persons would have reasonably understood that they had been terminated. In addition, the Respondent checked a box for involuntary termination on the separation information sheet for each employee. (Nonsensically, a box for voluntary resignation was also checked.)

Contrary to the Respondent's claim, we need not decide whether the discharges were motivated by the Respondent's animus toward the Union. The complaint alleged, and the judge found, that the Respondent violated Sec. 8(a)(1) by discharging the 10 employees for engaging in a protected concerted work stoppage; it did not allege that the Respondent violated Sec. 8(a)(3) by discriminating against them to encourage or discourage membership in any labor organization. See *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011).

[7] The Respondent does not except to the judge's finding that, under the multifactor test set forth in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), the strikers did not interfere with the Respondent's property rights in a manner that would render their work stoppage unprotected.

[8] In *Emporium Capwell*, a minority group of employees, dissatisfied with the contractual grievance procedure, refused to participate in it. Contrary to the union's advice, the employees picketed their employer's store in an attempt to circumvent the union and bargain separately with the employer. 420 U.S. at 50. The Court found such conduct unprotected because it undercut the principle of exclusive representation set forth in Sec. 9(a) of the Act. Unlike in *Emporium Capwell*, the strikers here did not seek to circumvent the Union and bargain separately with the Respondent, and the Union did not oppose the strikers' work stoppage.

[9] No party urges us to reconsider the standard set forth in *Silver State Disposal*. In a future appropriate case, we would be willing to consider whether that standard is consistent with the principles of *Emporium Capwell*. See *CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers*, 368 NLRB No. 84, slip. op. at 3 fn. 6 (2019).

strike was still protected activity because "the employees' demands and statements during this period w[ere] not in derogation of the [u]nion or contrary to, or inconsistent with, the [u]nion's bargaining position"), enfd. 966 F.2d 725 (2d Cir. 1992); *Pacemaker Yacht Co.*, 253 NLRB 828, 831 fn. 8 (1980) (finding unauthorized work stoppage protected because it "was not in derogation of the employees' bargaining representative"), enf. denied on other grounds 663 F.2d 455 (3d Cir. 1981).

Under the *Silver State Disposal* standard, we find that the work stoppage was protected. The evidence in this case establishes that a purpose of the work stoppage was to concertedly complain about and question the Respondent regarding perceived wage disparities between senior employees and recently hired employees. In general, the right of employees to engage in concerted activities of this type is protected by Sections 7 and 13 of the Act.[10] Thus, the work stoppage was protected unless it was rendered unprotected under the *Silver State Disposal* standard, and the burden shifted to the Respondent to demonstrate that the work stoppage was unprotected. See *Silver State Disposal Service*, 326 NLRB at 85 (explaining that, where employees' work stoppage is of a type generally protected by the Act, employer bears the burden of proving that stoppage is unprotected). The Respondent has failed to sustain its burden. To begin with, the Respondent has not proven that the ten employees attempted to circumvent their union and bargain directly with the employer. When they stopped working, Union Steward Guadalupe Ortiz, speaking for the group, told Superintendent Chris Kitch that they wanted to know why raises were not given out and why some people were making more than others. Notably, the employees never demanded any wage increase from anyone, let alone seek (explicitly or implicitly) to bypass the Union and separately negotiate with the Respondent over wages.[11] To the contrary, they rejected plant manager Mike Helzer's proposal to meet and discuss the issue later that day.[12]

What's more, the Respondent does not except to the judge's finding that there is no evidence the Union opposed, or did not support, the group's work stoppage/walkout. Indeed, the fact that the Union submitted a grievance to the Respondent on the discharged strikers' behalf indicates that their position was not inconsistent with the Union's. See *United Cable Television Corp.*, 299 NLRB 138, 143 (1990) (reasoning that an employee's letter was not inconsistent with the union's position, in part, because the union pursued a grievance to arbitration on the employee's behalf after he was discharged for posting the letter). Further, the general concern prompting the work stoppage—lack of consideration of seniority in employee pay—was consistent with the wage provisions of the parties' expired collective-bargaining agreement, which represented the status quo terms and conditions of employment. And the Respondent cannot show that the group's concern with wage inequities was inconsistent with the Union's position in bargaining at the time of the March 2018 work stoppage, because the Respondent's own unlawful failure and refusal to furnish information about employees' current wages and related matters, beginning in November 2017 and continuing as of the time of the stoppage (and thereafter), left the Union unable to formulate any wage proposal. Cf. *Edmonds Villa Care Center*, 249 NLRB 705, 706 (1980) (finding that employees did not lose protection of the Act when they sought premium pay for working while short staffed because the newly certified union had yet to adopt any bargaining positions or policies), enf. denied mem. 692 F.2d 766 (9th Cir. 1982). In sum, the Respondent has failed to establish that the strikers' position was inconsistent with the Union's position. For these reasons, in addition to the those provided by the judge, we find that the Respondent has not shown that the work stoppage was an unprotected wildcat strike, and the Respondent violated Section 8(a)(1) by discharging the ten strikers.

Because we agree with the judge that the employees' work stoppage was a protected concerted activity, we also

[10] Sec. 7 of the Act relevantly provides employees the right to engage in concerted activities for mutual aid or protection. Sec. 13 of the Act provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications of that right."

[11] The judge's suggestion that the strikers demanded a wage increase is not supported by the record. Cf. *River Oaks Nursing Home*, 275 NLRB 84, 86 (1985) (finding statement—"We will be back when this place is properly staffed"—a demand for a specific number of nurses aides).

[12] Our dissenting colleague concedes that the strikers never asked or demanded that the Respondent bargain separately with them about a wage increase. Nevertheless, he would find the strike unprotected. He asserts it is "inconsequential" that the employees did not actually demand a wage increase "because it was a fundamental reason that they left their workstations in the first place" and because the Respondent assertedly understood their actions as a demand to bargain. We disagree. The dissent conflates the employees' general desire for correction of perceived wage disparities with an attempt to bypass the Union and bargain directly with the Respondent over wages. Especially bearing in mind that the burden of proof on this issue rested with the Respondent, we find it critical that the employees never asked for separate bargaining or demanded a wage increase. Contrary to the dissent, Ortiz' statement to Helzer—"if we went in back to the building and worked that day, [the Respondent] would forget about the issue and we wouldn't have a solution to what we had asked for"—does not evidence that the strikers sought to compel separate bargaining over wages. The record fails to show that the "solution" to which Ortiz referred was anything beyond comporting with status quo terms respecting employee seniority in wage rates.

adopt the judge's findings that the Respondent violated Section 8(a)(1) by threatening to discharge employees for engaging in protected concerted activities, by telling employees they were terminated for engaging in protected concerted activities, and by threatening to call the police because the employees engaged in protected concerted activities.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 9:

"9. In about early November 2018, the Respondent, through Paul Hernandez, Jose Madrigal, and Josue Guerrero, interrogated employees about their Union and/or Board activities, in violation of Section 8(a)(1) of the Act."

2. Substitute the following for Conclusion of Law 15:

"15. In January and July 2018, the Respondent unilaterally granted wage increases of 15 cents an hour, and, between January 23 and 28, 2018, while the collective-bargaining agreement was still in effect, the Respondent failed to obtain the Union's consent before modifying the collective-bargaining agreement to increase employees' wages 15 cents an hour in violation of Section 8(a)(5) and (1) and 8(d) of the Act."

3. Substitute the following for Conclusion of Law 17:

"17. In August 2018, the Respondent unilaterally implemented a new wage system without providing the Union with notice or an opportunity to bargain over the decision or its effects in violation of Section 8(a)(5) and (1) of the Act."

4. Substitute the following for Conclusion of Law 18:

"18. Since about March 2018 through the present, the Respondent has been failing and refusing to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act."

5. Delete Conclusion of Law 10 and renumber the subsequent paragraphs accordingly.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we amend the judge's remedy in the following respects.

Having affirmed the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally giving effect to untimely dues check-off authorizations and by modifying the contract by doing so for the period between January 23 and 28, 2018, we shall order the Respondent to cease and desist from failing and refusing to deduct and remit dues to the Union pursuant to valid checkoff authorizations during the term of any collective-bargaining agreement containing a checkoff provision. We shall also order the Respondent to reimburse the Union for any dues that it failed to deduct from wages and remit to the Union on behalf of employees who had executed valid checkoff authorizations from January 23, 2018, until the collective-bargaining agreement expired on January 28, 2018,[13] with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), without recouping the money owed for past dues from those employees.[14]

In addition to the remedies recommended by the judge for the Respondent's unlawful bad-faith bargaining, which we adopt, we shall order the Respondent to reimburse the Union for its bargaining expenses. In *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the Board set forth the standard for determining whether bargaining expenses should be awarded, stating: "In cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent" that traditional remedies will not eliminate their effects, an award of negotiation expenses is warranted to "make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength

[13] As a general matter, an employer has no statutory duty to continue honoring a collective-bargaining agreement's dues-checkoff provision after the agreement expires. Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Center, 368 NLRB No. 139 (2019), rev. granted sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 2020 WL 7774953 (9th Cir. Dec. 30, 2020); see also NLRB v. Whitesell Corp., 638 F.3d 883, 894 (8th Cir. 2011) ("[D]ues-checkoff provisions are not terms or conditions of employment that will continue to be in effect until the parties reach a new agreement or bargain to a genuine impasse."); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 254–255 (D.C. Cir. 1991) (holding that the Board properly declined to order make-whole relief for employer's failure to honor dues check-off provision beyond the expiration date of the collective-bargaining agreement). Accordingly, in remedying the unfair labor practice here, we shall limit the Respondent's duty to reimburse the Union to the term of the parties' collective-bargaining agreement, which expired January 28, 2018.

[14] See, e.g., *Alamo Rent-A-Car*, 362 NLRB 1091, 1091 fn. 1 (2015), review denied sub nom. *Enterprise Leasing Company of Florida v. NLRB*, 831 F.3d 534 (D.C. Cir. 2016). The reimbursement requirement will be offset by the amount of any dues that the Union collected over the compliance period from employees covered by the dues payment order. Id. No party here asks us to reconsider the dues-recoupment bar, but we would be willing to do so in a future appropriate case.

that is necessary to ensure a return to the status quo ante at the bargaining table." The Board emphasized that this standard "reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses." Id.

Here, we find that the Respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that traditional remedies will not eliminate their effects. As the judge described in detail, the Respondent deliberately acted throughout bargaining to prevent any meaningful progress toward a contract. Significantly, during a period of more than 6 months following the Union's November 2017 request to bargain a successor contract, the Respondent met with the Union just twice. Although the parties had planned to exchange proposals at the first session, held on March 22, the Respondent came empty handed. It did provide a contract proposal at the second session, held on May 15. However, the Respondent continued to fail to produce any of the information requested by the Union beginning back in November 2017, which exclusively concerned unit employees' terms and conditions of employment and was essential to the Union's efforts to negotiate a contract. In June 2018, the parties entered into a settlement agreement in which the Respondent admitted having bargained in bad faith. That agreement required the Respondent to bargain in good faith and to furnish the information the Union had been asking for since the previous November.

In July 2018, the Respondent provided information concerning 15 employees out of a bargaining unit of 250-300 employees. It never furnished any additional requested information. Also, that same month, the Respondent began meeting again with the Union, and it continued to do so two or three times a month from July to December 2018. For all these sessions, however, it sent administrative assistant Mary Junker as its sole bargaining representative. Junker had no authority to make or respond to proposals or to bind the Respondent in any way. She made this abundantly clear at the first meeting in July 2018, stating: "I don't know why I am here. I don't know why they sent me. I can't make any decisions." As a result, the so-called bargaining sessions were usually brief because Junker could not discuss bargaining proposals in any meaningful manner. She was merely a conduit between the Union and the Respondent's owners, communicating the Union's proposals to the owners and relaying to the Union their response to those proposals, which was, with one exception, to reject them without explanation and without any counterproposal.[15] Furthermore, while this charade was in progress, the Respondent unlawfully made unilateral changes to the employees' wages and bypassed the Union to deal directly with unit employees. As a result of the Respondent's bad-faith bargaining, the Union fruitlessly expended time and financial resources arranging dates for bargaining, developing proposals in the vacuum created by the Respondent's silence, and attending bargaining sessions where no bargaining took place.

Accordingly, exercising our broad discretion under Section 10(c) of the Act to fashion appropriate remedies, we shall order the Respondent to reimburse the Union for the bargaining expenses the Union incurred during the period of time from March 22, 2018, through January 25, 2019, upon submission by the Union of a verified statement of costs and expenses.[16]

Additionally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as the "traditional, appropriate" remedy for the Respondent's unlawful failure and refusal to bargain in good faith. Id. at 68.

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, above at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' [Section] 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

Although Board precedent does not require a *Vincent* justification, we have examined the particular facts of this case as the court there required and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees, who were

[15] On August 17, Junker conveyed the owners' acceptance of the Union's proposals on four minor items.

[16] See, e.g., *Bemis Co.*, 370 NLRB No. 7, slip op. at 4–5 (2020) (awarding bargaining expenses to make the union whole for the resources wasted because of the respondent's failure to bargain in good faith, to restore the union's economic strength, and to ensure a return to the status quo ante at the bargaining table); *Camelot Terrace*, 357 NLRB 1934, 1936–1937 (2011) (same), enfd. in relevant part 824 F.3d 1085 (D.C. Cir. 2016). The period covered by the negotiation-expense remedy begins on the date the Respondent's bad-faith bargaining commenced, and it ends on the date Junker last met with a representative of the Union.

denied the benefits of collective bargaining by the Respondent's refusal to bargain in good faith with the Union. By engaging in bad-faith bargaining and thereby frustrating the possibility of concluding a successor collective-bargaining agreement, the Respondent unlawfully deprived unit employees of the opportunity to secure the stability and predictability such an agreement would provide. Moreover, the Respondent evidenced a flagrant disregard of its unit employees' Section 7 rights when it refused to bargain in good faith with their chosen collective-bargaining representative shortly after the Regional Director approved a settlement agreement in which the Respondent agreed to "bargain in good faith with the Union." At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition exists, moreover, it may be, at least in part, the product of the Respondent's unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order. In this regard, we observe that the Union cannot begin to bargain on a level playing field until the Respondent has fully complied with its obligation to furnish the Union the information it requested beginning in November 2017, the vast majority of which has yet to be provided. And, once furnished, that information will need to be analyzed and factored into the Union's bargaining positions, which will take time. Under these circumstances, a reasonable period during which the Union's majority status cannot be challenged clearly fosters meaningful collective bargaining.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's unlawful surface bargaining because it would permit a challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unjust in the circumstances presented here, where the Respondent's unlawful bad-faith bargaining frustrated any real progress toward achieving a successor agreement—for which unit employees, not privy to the Respondent's conduct, would probably fault their bargaining representative, at least in part—and where the Respondent's unlawful unilateral changes absent a valid impasse and removal of the maintenance employees from the bargaining unit would further tend to undermine the unit employees' support for the Union. Thus, the Respondent's failure to bargain in good faith would likely have a continuing effect, tainting any employee disaffection from the Union for a period of time after the issuance of this decision and order. Moreover, the imposition of a bargaining order would signal to employees that their rights guaranteed under the Act will be protected. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent's bad-faith surface bargaining.[17]

Finally, in addition to the Board's standard remedies for specific violations in this case, the judge recommended a notice-reading remedy. We agree that a reading of the remedial notice is warranted here. In particular, we note that in June 2018, the Respondent posted a notice to employees pursuant to an agreement settling an earlier unfair labor practice charge, expressly promising that it would "bargain in good faith with the Union" and "provide the Union with the information it requested in writing on November 6, 2017 [and subsequent dates]." But as the judge found, the Respondent broke both of those promises and further committed numerous, substantial, and widespread violations of Section 8(a)(1) and (5) of the Act. In light of these circumstances, we believe a public reading of the notice is appropriate "to dissipate as much as possible any lingering

[17] In addition to an affirmative bargaining order to remedy the Respondent's bad-faith bargaining, the judge recommended a limited bargaining order to remedy its unlawful unilateral changes to the employees' wages. However, "when . . . the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain" and "encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). In light of our affirmative bargaining order requiring the Respondent to resume bargaining for a successor agreement, we will dispense with a limited bargaining order, which might be interpreted to "imply a right of unilateral action—once notice and opportunity to bargain have been given—inconsistent with *Bottom Line Enterprises*." *Valley Health System, LLC*, 369 NLRB No. 16, slip op. at 6 fn. 18 (2020).

effects of the Respondent's unfair labor practices" and allow the employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008). The justification for a notice reading is especially compelling here, where the Respondent flagrantly disregarded its obligations under the Act by embarking on a course of bad-faith surface bargaining almost immediately after it settled a prior bad-faith bargaining charge.

ORDER

The National Labor Relations Board orders that the Respondent, Noah's Ark Processors, LLC d/b/a WR Reserve, Hastings, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food and Commercial Workers Local Union No. 293 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Threatening employees with discharge for engaging in protected concerted activities.

(c) Telling employees that they were terminated for engaging in protected concerted activities.

(d) Threatening to call the police because employees engaged in protected concerted activities.

(e) Coercing employees into signing preprinted forms prohibiting disclosure of their employment information without their written consent.

(f) Failing and refusing to deduct and remit dues to the Union pursuant to valid, unexpired, and unrevoked checkoff authorizations during the term of any collective-bargaining agreement.

(g) Coercively interrogating employees about whether they had received a subpoena from the National Labor Relations Board.

(h) Coercively interrogating employees about their union activities.

(i) Coercively interrogating employees about their communications with agents of the National Labor Relations Board.

(j) Telling any employee that he or she must meet with a company attorney before meeting with an agent of the National Labor Relations Board investigating unfair labor practice charges filed against the Respondent.

(k) Discharging employees for engaging in protected concerted activities.

(l) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(m) Bypassing the Union and dealing directly with unit employees regarding their terms and conditions of employment.

(n) Changing the terms and conditions of employment of unit employees by granting wage increases and implementing a new wage system without first notifying the Union and giving it an opportunity to bargain.

(o) Changing the unit employees' hourly wage rates and paying them wages contrary to the parties' collective-bargaining agreement without the Union's consent.

(p) Changing unit employees' terms and conditions of employment by implementing its collective-bargaining proposal addressing mandatory subjects of bargaining, such as dues checkoff, grievance procedure, safety, holidays, union access, and term of agreement, without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

(q) Insisting to impasse and implementing a proposal to remove a classification of employees from the unit, a permissive subject of bargaining.

(r) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, if it has not already done so, offer Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) On request, bargain with the Union in good faith and at reasonable times as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. Such bargaining sessions shall be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. The Respondent shall submit written bargaining progress reports every 30 days to the compliance officer for Region 14, serving copies thereof on the Union. The appropriate unit is:

> All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(c) On request by the Union, rescind the changes in the terms and conditions of employment for its unit

employees that were unilaterally implemented on January 30, 2019.

(d) Rescind the removal of the maintenance employees from the bargaining unit, which was implemented on January 30, 2019, without the Union's consent.

(e) On request by the Union, rescind the unilateral wage increases granted to unit employees in January and July 2018.

(f) On request by the Union, rescind any or all changes in wage rates unilaterally implemented on August 23, 2018.

(g) Reimburse the Union for all dues it failed to deduct and remit to the Union from January 23, 2018, until the collective-bargaining agreement expired on January 28, 2018, in the manner prescribed in the amended remedy section of this decision.

(h) Furnish to the Union in a timely manner the information requested by the Union on November 6 and December 27, 2017, January 5 and 24, February 12, and March 6 and 28, 2018.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(j) Make Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(k) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes in terms and conditions of employment on January 30, 2019, in the manner set forth in the remedy section of the judge's decision.

(l) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(m) Compensate the Union for all bargaining expenses it incurred during the period beginning March 22, 2018, through January 25, 2019, when it engaged in unlawful bad-faith bargaining. Upon receipt of a verified statement of costs and expenses from the Union, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 14 of the National Labor Relations Board, who will document receipt and forward the payment to the Union.

(n) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(o) Post at its facility in Hastings, Nebraska, copies of the attached notice marked "Appendix" in both English and Spanish.[18] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2017.

(p) Hold a meeting or meetings during work hours at its facility in Hastings, Nebraska, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the attached notice marked "Appendix" will be read to employees in both English and Spanish by a high-ranking management official of the Respondent in the presence of a Board Agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

management official of the Respondent and, if the Union so desires, the presence of an agent of the Union.[19]

(q) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 27, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

Contrary to my colleagues and the judge, I would find that the Respondent lawfully discharged the 10 employees who elected not to return to their work stations after participating in the March 27, 2018 work stoppage, and consequently, that its related remarks and instructions to employees that day were lawful. Additionally, I do not agree that two extraordinary remedies, notice-reading and reimbursement of the Union's negotiating expenses, are warranted here.[1]

The Work Stoppage

The Respondent operates a slaughter and meat processing and packing facility. The Respondent purchased the facility on January 1, 2015, retained a majority of its predecessor's employees, and assumed the collective-bargaining agreement then in place, which was effective from January 28, 2013, to January 28, 2018, and covered 250-300 employees. On November 6, 2017, the Union notified the Respondent of its intent to reopen the agreement. On March 22, 2018, the parties held their first bargaining session, and the Union presented its noneconomic proposals. A mere 5 days later, 20 employees who wanted raises or had heard a rumor about a new hire starting at a higher wage than they were paid ceased working in order to press their demands and inquiries directly to managers. Although the employees enlisted the help of union steward Guadalupe Ortiz, who was more fluent in English than they, neither the group nor Ortiz informed the Union of their plan prior to engaging in the work stoppage.[2] The group gathered in the cafeteria and spoke briefly with fabrication superintendent Chris Kitch. Kitch left and returned with operations manager Paul Hernandez, who told the employees, "those who don't want to work can go home" and "you guys either go to work, leave now, or you're terminated." Ten employees returned to work. The other ten turned in their supplies and went out to the parking lot. Hernandez followed them and was joined by plant manager Mike Helzer, who offered the employees the option of finishing their shift and discussing the issue after work. They declined. Helzer told the employees to leave the lot because the police were on the way, and Hernandez collected their security badges. They asked if they could wait for the human resources manager to arrive, but Hernandez refused, saying he would call the police if they did not leave. They left without further incident.

No party disputes the fact that the employees' work stoppage was unsanctioned by the Union at its inception. *Silver State Disposal Service*, 326 NLRB 84, 85, 103 (1998), sets forth the Board's current standard for assessing whether an unsanctioned walk-out by union-represented employees is protected within the meaning of Section 7 of the Act: whether the dissident employees were attempting to bypass their union and bargain directly with the employer, and whether the employees' position was inconsistent with the union's position.[3]

In my view, my colleagues have misapplied the *Silver State* test. The employees here ceased working in order to present *their* demands for wage increases or adjustments—not the Union's—to the Respondent. That the employees did not actually demand the wage increases is inconsequential because it was a fundamental reason that they left their workstations in the first place. Significantly, the Respondent understood it to be a demand to bargain. Notably, the employees declined plant manager Helzer's offer to discuss the matter after work because, in the words of Ortiz, "if we went in back to the building and worked

[19] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted or read until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

[1] I agree with my colleagues on the remaining issues in the case.

[2] Ortiz' only union responsibility was to deal with safety issues.

[3] Like my colleagues, I would be willing to consider in a future appropriate case whether the *Silver State* standard is consistent with the principles of *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975).

that day, [management] would forget about the issue and we wouldn't have a solution to what we had asked for." The response implies that the employees declined Helzer's offer because they wanted to discuss wages right then and there, at a time when a responsible union official was absent. And, as alluded to above, the Union had yet to formulate wage proposals.[4] Thus, the employees' actions not only were of a piece with a demand to bargain separately from the Union, they also were inherently inconsistent with the Union's approach to bargaining at that time. The fact that the employees' demands were not at odds with yet-to-be-formulated union proposals does not change their character or erase the fact that this group of employees prematurely took matters into their own hands on a subject or subjects that were within the purview of their exclusive bargaining representative under Section 9(a) to negotiate or to grieve. My colleagues find consistency where none exists. Moreover, the Respondent gave the 10 employees *three* opportunities to return to work, and the employees rejected them all, opting instead to walk away from their jobs. Accordingly, I would find that the conduct of the alleged discriminatees is not protected activity under the Act, and that the Respondent did not violate Section 8(a)(1) by terminating them. Consonantly, I would also find that Hernandez' and Helzer's statements to employees during the work stoppage were lawful.

The Extraordinary Remedies

Contrary to my colleagues, I would not order a reading of the remedial notice. As explained above, I find that the Respondent lawfully terminated the 10 employees who engaged in the work stoppage, and that its statements associated with the work stoppage were lawful as well. The remaining violations, though serious, are not so egregious as to warrant a notice-reading. See, e.g., *Ingredion, Inc*., 366 NLRB No. 74, slip op. at 1 fn. 2 (2018) (Member Emanuel, dissenting), enfd. 930 F.3d 509 (D.C. Cir. 2019).

In the same vein, I depart from their view that the Respondent should reimburse the Union for its negotiation expenses, a comparatively rare remedy. The Respondent conducted itself dismally with respect to its duty to bargain in good faith, but this decision and order already levies another stringent but warranted remedy, i.e., the imposition of a bargaining schedule. In my view, that is sufficient.

Dated, Washington, D.C. January 27, 2021

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William J. Emanuel Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with United Food and Commercial Workers Local Union No. 293 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT threaten you with discharge if you engage in protected concerted activities.

WE WILL NOT tell you that you are terminated because you engage in protected concerted activities.

WE WILL NOT threaten to call the police because you engage in protected concerted activities.

WE WILL NOT coerce you into signing preprinted forms prohibiting disclosure of your employment information without your written consent.

WE WILL NOT fail and refuse to deduct union dues and remit them to the Union on behalf of eligible employees during the term of a collective-bargaining agreement containing a valid dues-checkoff provision.

WE WILL NOT coercively interrogate you about whether you have received a subpoena from the National Labor Relations Board.

WE WILL NOT coercively interrogate you about your union activities.

[4] The Union was waiting on responses to information requests, including current wage rates, which the Respondent subsequently unlawfully delayed providing and later insufficiently provided. However, bargaining had begun only days earlier, and the dissident employees (a mere 6–8 percent of the unit) did not know at the time of their work stoppage and walkout how bargaining would proceed.

WE WILL NOT coercively interrogate you about your communications with agents of the National Labor Relations Board.

WE WILL NOT tell you that you must meet with a company attorney before you meet with an agent of the National Labor Relations Board investigating unfair labor practice charges filed against us.

WE WILL NOT discharge any of you for engaging in protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT bypass the Union and deal directly with you over your terms and conditions of employment.

WE WILL NOT change your terms and conditions of employment by granting wage increases and implementing a new wage system without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT change your wage rates and/or pay you wage rates contrary to the collective-bargaining agreement without the Union's consent.

WE WILL NOT change your terms and conditions of employment by implementing a collective-bargaining proposal addressing mandatory subjects of bargaining, such as dues checkoff, grievance procedure, safety, holidays, union access, and term of agreement, without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

WE WILL NOT insist to impasse and implement a proposal to remove a classification of employees from the bargaining unit, a permissive subject of bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer, if we have not already done so, Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, on request, bargain with the Union in good faith and at reasonable times as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL, on request, hold bargaining sessions for a minimum of 24 hours per month, at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees, and WE WILL submit written bargaining progress reports to the compliance officer for Region 14, with a copy served on the Union.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that we unilaterally implemented on January 30, 2019.

WE WILL restore the maintenance employees to the bargaining unit.

WE WILL, if and only if the Union asks us to do so, rescind the unilateral wage increases granted to unit employees in January and July 2018.

WE WILL, if and only if the Union asks us to do so, rescind any or all changes in wage rates unilaterally implemented on August 23, 2018.

WE WILL reimburse the Union for all dues that we failed to deduct and remit to the Union from January 23, 2018, until January 28, 2018, pursuant to the dues-checkoff provision of our 2013–2018 collective-bargaining agreement with the Union.

WE WILL furnish to the Union in a timely manner the information requested by the Union on November 6 and December 27, 2017, January 5 and 24, February 12, and March 6 and 28, 2018.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make these employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make whole, with interest, eligible employees in the above-described unit for any loss of earnings resulting from our implementing our final offer on January 30,

2019, without the parties having reached a lawful impasse in collective bargaining.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL compensate the Union for all bargaining expenses it incurred from March 22, 2018, through January 25, 2019, the period of time during which we failed to bargain in good faith.

NOAH'S ARK PROCESSORS, LLC D/B/A WR RESERVE

The Board's decision can be found at www.nlrb.gov/case/14-CA-217400 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

William LeMaster and *Julie Covel, Esqs.,* for the General Counsel.
Jerry L. Pigsley and *Ashley S. Dugan, Esqs.,* for the Respondent.
Frederick Zarate, Esq., for the Union.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These cases were tried on March 18–22, 2019, in Hastings, Nebraska, based on the General Counsel's second consolidated complaint alleging that Noah's Ark Processors, LLC d/b/a WR Reserve (Respondent) violated Sections 8(a)(1) and (5) and 8(d) of the National Labor Relations Act (Act), beginning on November 6, 2017, and continuing through the hearing.

The United Food and Commercial Workers Local Union No. 293 (Union) represents a unit of employees working for Respondent at its Hastings slaughter, processing, and packing facility. The parties' most recent collective-bargaining agreement expired on January 28, 2018. On November 6, 2017, the Union sent Respondent a reopener letter requesting dates for the parties to commence negotiations over a successor agreement. In this letter, the Union requested certain information about unit employees for it to use during negotiations. The Union repeated its requests for the information at issue on December 27, 2017, January 5, January 24, February 12, and March 6 and 28, 2018. The complaint alleges Respondent unlawfully failed or refused to provide the Union with the information.

The complaint also alleges that since at least January 23, 2018, Respondent solicited employees to resign from the Union and to cease paying dues, provided employees with preprinted forms to resign from the Union and revoke their dues-checkoff authorizations, interrogated employees about their support for the Union, and coerced employees into signing preprinted forms prohibiting Respondent from disclosing their employment information without their written consent. This latter form labeled as "confidential"much of the same information the Union had requested for bargaining. The complaint further alleges that at around this time, Respondent began failing to deduct and remit dues to the Union despite valid, unexpired, and unrevoked dues-checkoff authorizations and changed unit employees' hourly wage rates, without the Union's consent and without bargaining with the Union to a good-faith impasse.

The complaint further alleges that in March 2018, Respondent, through its supervisors, told employees during a meeting that they were not represented by a union, it was going to remove the Union, there would be no union moving forward, and they would not receive a raise because of the Union.

Later in March, a group of employees engaged in a work stoppage to protest wage disparities and to demand increases. Respondent's managers allegedly threatened the employees with discharge if they did not return to work, then discharged 10 employees for participating in the work stoppage, and later stated the police would be called if the employees did not leave the property.

Next, the complaint alleges that in late June 2018, Respondent unlawfully bypassed the Union and engaged in direct dealing with unit employees when supervisors surveyed employees about moving the observance of the Independence Day holiday from July 4 to July 6.

In October 2018, the Board issued subpoenas to employees to provide affidavits as part of the investigation into the underlying unfair labor practice charges against Respondent. The complaint alleges that in late October and early November 2018, Respondent unlawfully interrogated employees about the correspondence they received from the Board or about the Union, without providing the assurances required under *Johnnie's Poultry*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). It also alleges that Respondent, through its supervisors, unlawfully required employees to meet with and use attorneys compensated by Respondent prior to and when meeting with Board agents for their affidavits.

Respondent and the Union commenced negotiations over a successor collective-bargaining agreement in late March 2018.

[1] Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

The complaint alleges that since March 2018, and continuing, Respondent has failed to bargain in good faith with the Union by, in addition to the above conduct, failing to cloak its bargaining representatives with the authority to enter into binding agreements, cancelling bargaining sessions at the last moment, failing to make bargaining proposals, and failing to provide explanations for rejections of the Union's bargaining proposals. The complaint also alleges Respondent made statements and engaged in conduct to undermine the Union as the employees' bargaining representative.

Finally, the complaint alleges that on about January 30, 2019, Respondent implemented its last, best, and final offer, in which it made changes to dues checkoff, grievance procedures, safety, holidays, union access, and the term of the agreement, which are all mandatory subjects of bargaining, without bargaining with the Union to a good-faith impasse. The complaint also alleges Respondent insisted to impasse and implemented a change to the scope of the unit, which is a permissive subject of bargaining.

As explained below, I find Respondent committed certain of the alleged violations and recommend certain remedial steps to address those violations. I recommend dismissing the remaining allegations.

II. STATEMENT OF THE CASES

The Union filed the charge in Case 14–CA–217400 on March 28, 2018; the charge in Case 14–CA–224183 on July 23, 2018 (later amended on August 22, September 20, and December 19, 2018); the charge in Case 14–CA–226096 on August 22, 2018 (later amended on September 20 and December 19, 2018); and the charge in Case 14–CA–231643 on November 26, 2018 (later amended on December 19, 2018). On December 28, 2018, the Regional Director for Region 14, on behalf of the General Counsel, issued a consolidated complaint and notice of hearing in these four cases. On January 11, 2019, Respondent filed its answer to this consolidated complaint, denying the alleged violations.

On February 1, 2019, the Union filed its charge in Case 14–CA–235111 (later amended on February 11, 2019). On February 22, 2019, the Regional Director for Region 14, on behalf of the General Counsel, issued an order further consolidating cases, second consolidated complaint, and notice of hearing, adding the allegations from Case 14–CA–235111. On March 8, 2019, Respondent filed its answer to the second consolidated complaint, denying the alleged violations.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally.[2] Respondent and General Counsel filed post-hearing briefs, and General Counsel filed a reply brief, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following

III. FINDINGS OF FACT[3]

A. Jurisdiction and Labor Organization Status

At all material times, Respondent has been a limited liability company with an office and place of business in Hastings, Nebraska, where it has been engaged in the slaughter, processing, packaging, and non-retail sale of meat products ("Hastings facility"). In conducting its operations during the 12-month period ending November 30, 2018, Respondent sold and shipped from its Hastings facility goods valued in excess of $50,000 directly to points outside the State of Nebraska. During the 12-month period ending November 30, 2018, Respondent, in conducting its operations, purchased and received at its Hastings facility goods valued in excess of $50,000 directly from points outside the State of Nebraska. Respondent admits, and I find, that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As such, I find this dispute affects commerce and the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

Respondent admits, and I find, that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Respondent is a Successor to Nebraska Prime Group

Prior to January 1, 2015, Nebraska Prime Group ("NPG") owned and operated the Hastings facility. On January 1, 2015, Respondent acquired the Hastings facility when it purchased the business of NPG. Respondent admits, and I find, that since January 1, 2015, it has continued to operate NPG's business in basically unchanged form, employed as a majority of its employees individuals who were previously employees of NPG, and adopted the collective-bargaining agreement between NPG and the Union, dated January 28, 2013 to January 28, 2018.

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[2] On the third day of hearing, Respondent filed a motion for a bill of particulars and for a more definite statement regarding subpars. 11(b) and 12(a) of the second consolidated complaint, and it moved for a continuance to receive and review that additional information. The General Counsel orally opposed the motions. After discussions with the parties, the General Counsel introduced GC Exhs. 17 and 18, which provided additional details regarding the allegations contained in those two paragraphs. After which, I denied Respondent's motions. (Tr. 612–622).

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having conflicted with credited testimony or other evidence, or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also have considered factors such as: the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)). There are certain specific credibility determinations set forth below.

C. Collective-Bargaining Relationship

In 2011, and through the sale of its business on around January 1, 2015, NPG recognized the Union as the exclusive collective-bargaining representative of "all production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act (hereinafter "the Unit"). Since January 1, 2015, Respondent has continued to recognize the Union as the designated exclusive collective-bargaining representative of the Unit. At all times since January 1, 2015, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the Unit.

The Unit consists of between 250–300 employees. Approximately 80 percent of the Unit is Spanish speaking and is unable to read, speak, or write in English.[4]

Prior to the expiration of the parties' 2013–2018 collective-bargaining agreement, the Union requested to enter into an extension agreement while the parties commenced negotiations over a successor agreement. (Jt. Exh. 3). Respondent declined to enter into an extension agreement, and there is no evidence the parties agreed to extend any portion of their agreement post expiration.

D. Respondent's Operations and Hierarchy

Respondent has its corporate offices in New Jersey. The chief executive officer is Fischel Ziegelheim. His business partner/consultant is Michael Koenig. At the Hastings facility, Mike Helzer is the plant manager. Under Helzer is Paul "Pablo" Hernandez, the operations manager. Lidia Acosta is the human resources manager. Chris Kitch is the fabrication superintendent. Clay Irish is the slaughter superintendent. Kitch and Irish report to Hernandez. Joel Murillo, Jose Madrigal, Karen Mendoza, Josue Guerrero, Marulys Castillo Cisnero, and Luis Prado are supervisors. Murillo, Madrigal, Mendoza, and Guerrero report to Kitch. Each of these individuals is an admitted supervisor and agent of Respondent, within Section 2(11) and (13) of the Act, respectively. Dinora Murillo is the human resources assistant and Mary Junker is the former human resources manager and current administrative assistant. Both are admitted agents of Respondent within Section 2(13) of the Act.

IV. ALLEGED UNFAIR LABOR PRACTICES

A. Requests for Information about Unit Employees for Bargaining

1. Factual summary

On November 6, 2017, Union President Mike Marty sent a reopener letter to Respondent's CEO Fischel Ziegelheim requesting dates for the parties to meet to begin negotiations over a successor collective-bargaining agreement. (Jt. Exh. 2). In the letter, Marty requested Respondent provide the following information for each Unit employee for the past 12 months: (1) a unique employee identifier; (2) department where employee works; (3) job classification; (4) job group/bracket; (5) hourly rate; (6) full-time or part-time status if applicable; (7) hiring/seniority date; (8) termination date, if applicable; (9) the total number of hours worked, including all hours worked such as regular, overtime and premium hours (not to include any hours paid but not worked, such as vacation and sick leave); (10) the number of overtime premium hours worked and paid; (11) the number of Sunday premium hours worked and paid; (12) the number of 6th day premium hours worked and paid; (13) the number of 7th day premium hours worked and paid; (14) the number of holiday premium hours worked and paid; (15) the number of night shift premium hours worked and paid; (16) the number of vacation hours paid but not worked; (17) the number of hours paid but not worked; (18) the number of personal day hours paid but not worked; (19) the amount of health and welfare contributions made; (20) the amount of pension contributions made; and (21) any other premium hours worked or hours paid but not worked. Respondent did not reply to the request for bargaining dates or the information.

Over the next 4 months, the Union made multiple follow-up requests for this same information. (Jt. Exh. 3). On December 27, 2017, Marty sent Ziegelheim an email reiterating his earlier request for bargaining dates and the listed information, stating the Union needed that information for bargaining a successor agreement. The Union received no response. On January 5, 2018, Marty sent a letter to Ziegelheim and Respondent's attorney, Jerry Pigsley, attaching a copy of his November 6 letter. The Union again received no response. On January 15, the Union's attorney, Eric Zarate, emailed Pigsley that the Union had not received any response to its prior requests, and it was renewing those requests. On January 17, Pigsley replied that he was working on getting the Union the requested information and he wanted to know dates the Union was available to commence bargaining. On January 24, Zarate replied to Pigsley that assuming the Union received the requested information soon, the Union tentatively planned to begin negotiations on around February 20. On February 12, Zarate sent Pigsley a letter stating that the Union still had not received any response to its earlier requests, including its request for information. On February 19, Pigsley replied to Zarate, proposing multiple bargaining dates in March, and noting that his client would seek to provide the Union with the requested information within the next 30 days. Later that day, Zarate agreed with Respondent's proposed bargaining dates if "the Company provides the requested information in the near future as indicated." (Jt. Exh. 3, p. 8). By email dated March 6, Zarate asked Pigsley if Respondent could provide any portion of the requested information prior to the parties' first negotiation session, which was scheduled for March 22. Pigsley replied that he had no update on the information the Union requested and he would seek to have his client provide some of the information ahead of the first bargaining session.

The parties met, as scheduled, for their first bargaining session on March 22, 2018. Respondent did not provide any of the information the Union had requested. (Tr. 662–663). On March 28,

[4] Tr. P. 553, lines 18–20 is corrected to reflect that Counsel for General Counsel asked human resources manager Lidia Acosta, "Okay, and like – my recollection also is about eighty percent of the hourly employees do *not* speak, read, or write English?" Acosta answered "Correct" and that they were "Spanish speaking."

2018, Zarate sent Pigsley an email that the Union was prepared to file an unfair labor practice charge if, by the end of the day, Respondent did not provide the Union with the requested information and schedule additional bargaining dates. (Jt. Exh. 3, pp. 17-18). Respondent provided neither.

On March 29, the Union filed its unfair labor practice charge in Case 14–CA–217400, alleging, in part, that Respondent was failing or refusing to provide the Union with the requested information which was relevant and necessary to bargaining.

The parties next met for contract negotiations on May 15, 2018. At that meeting, Respondent still had not provided the Union with any of the requested information.

On June 20, 2018, the parties entered into an informal Board settlement agreement in Case 14–CA-217400. The settlement included a requirement that Respondent provide the Union with the information it had been requesting since November 6, 2017. (Jt. Exh. 11.)

On July 13, 2018, Respondent sent the Union certain information for 15 employees in a Unit of between 250–300 employees. (Jt. Exh. 19.) On July 16, Zarate emailed Pigsley advising him, in detail, how Respondent's production was deficient. (Jt. Exh. 20.) On August 13, 2018, Zarate sent Pigsley an email regarding additional bargaining dates, inquiring whether Respondent would be providing any additional information in response to the Union's request(s). Although the parties continued to meet for negotiations through the end of 2018, Respondent failed to provide the Union with any additional information, and no additional information was provided as of the hearing. (Tr. 666).

2. Allegations and Analysis

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it failed or refused to fully provide the Union with the information requested on November 6 and December 27, 2017, January 5, January 24, February 12, and March 6 and 28, 2018, relating to Unit employees' terms and conditions of employment, including: employees' departments, job classifications, job groups, hourly wage rates, full-time or part-time status, seniority dates, termination dates, if applicable, hours worked and paid, overtime worked and paid, premium hours worked and paid, vacation hours paid, personal day hours paid, health and welfare contributions, and pension contributions, all of which is necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit.[5]

Section 8(a)(5) provides it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." An employer's duty to bargain includes providing the union with requested information that is relevant and necessary to contract negotiations, contract administration, grievance adjustment, and other representational duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *Postal Service*, 332 NLRB 635, 635 (2000). Most information concerning bargaining unit employees that pertains to their wages, hours, and terms and conditions of employment is presumptively relevant and must be furnished upon request. *North Star Steel Co.*, 347 NLRB 1364 (2006); *Bryant & Stratton Business Institute*, 323 NLRB 410 (1997). The burden is on the employer to rebut that presumption. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005); and *Miller Processing Services*, 308 NLRB 929 (1992).

In each of the requests at issue, the Union sought the same information. From the outset, the Union made it clear to Respondent that the information was necessary for contract negotiations. The information requested directly relates to the Unit employees' wages, hours, and other terms and conditions of employment, and, therefore, is presumptively relevant. For 9 months, Respondent failed to provide the Union with any information, and it only provided partial information after entering into an informal settlement agreement. The information provided was for a small percentage of the Unit, even though the requests (and the informal settlement agreement) called for Respondent to produce *all the requested information* for *all Unit employees*. Respondent has presented no defense to these allegations. In fact, Respondent does not address its failure or refusal to provide the requested information in its post-hearing brief. Based on these factors, I find Respondent repeatedly failed or refused to provide the Union with relevant and necessary information, in violation of Section 8(a)(5) and (1) of the Act.

B. Union Resignations, Revocations of Dues Deduction Authorizations, Non-Disclosure of Employment Information Forms, and Statements about the Union

1. Factual Summary

a. Union Resignations and Revocation of Checkoff Authorizations

Article 21 of the parties' agreement, entitled "Plant Visitation," states, in part, that Respondent will allow Union representatives the opportunity to meet with new employees during orientation to discuss the Union's role at the Hastings facility and to solicit them to apply to join the Union and authorize dues deduction from their paychecks. (Jt. Exh. 1). Prior to June 30, 2017, Respondent allowed Union business agent Terry Mostek and Union secretary Carmen Perez to meet with new employees during their orientations in accordance with Article 21. The checkoff authorization form (which is in Spanish or English, depending on the employee's fluency) states in pertinent part:

> This authorization shall be irrevocable for a period of one year from the date of execution thereof or until the termination of the collective bargaining agreement between the company I work for and my Union, whichever occurs sooner, and from year to year thereafter, unless not fewer than thirty days and not more than forty-five days prior to the end of any subsequent yearly period or the termination of the collective bargaining agreement, respectively, I give the company and my Union written notice of revocation bearing my signature thereto.

(GC Exh. 10.)[6]

[5] Par. 8 of the second consolidated complaint. A violation of Sec. 8(a)(5) is also a derivative violation of Sec. 8(a)(1). *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

[6] There is no union-security provision in the parties' agreement.

After meeting with the new employees during orientation, Perez would orally notify Respondent's human resources manager Lidia Acosta which employees had joined the Union and authorized dues checkoff. (Tr. 178–179). When Perez orally notified Acosta, Acosta would mark on the employee's new-hire form whether the employee was "union" or "nonunion." (Tr. 545) (GC Exh. 6.) Later, Perez would provide Acosta with signed copies of the employee's signed dues-checkoff authorization. Acosta would send a copy of that form to Respondent's corporate office in New Jersey, and she would retain a copy in the employee's personnel file at the Hastings facility. (Tr. 543–547.)

Acosta regularly provided Perez with lists of Unit employees who were no longer actively working for Respondent (i.e., either terminated, resigned, or on a leave of absence). Perez would use these lists to determine which Unit employees would no longer have dues deducted and remitted. Additionally, on a monthly basis, Respondent provided the Union with a list of employees for whom Respondent deducted dues from their paychecks and remitted those dues to the Union. (Tr. 193) (Jt. Exh. 14) (GC Exh. 14).

On around June 30, 2017, Respondent banned Union business agent Terry Mostek, and all Union agents, including Perez, from accessing the Hastings facility after Mostek allegedly told employees they would earn more if they worked at a Union-represented plant in nearby Grand Island, Nebraska.[7] Respondent also ceased regularly providing Perez with the lists of employees no longer actively working at the facility. (Tr. 590–591). On June 20, 2018, Perez emailed Acosta with new Union membership application/dues-checkoff authorization forms and asked her to distribute them to new Unit employees because Perez was no longer able to access the facility to meet with the employees. (Tr. 185) (GC Exh. 13). Perez received no response from Acosta. (Tr. 185).

Between September 2017 and July 2018, over 50 Unit employees signed documents resigning their membership in the Union and revoking their dues-checkoff authorization. (Jt. Exh. 12). All but two of the employees signed pre-printed forms Respondent created and provided to them. Those forms stated, "I, _____, no longer wish to participate on the union. Please stop withdrawing my dues effective immediately." For those who signed prior to early July 2018, the pre-printed resignation/revocation form was in English only. For those who signed after early July 2018, the resignation/revocation form was in English and Spanish. As stated, approximately 80 percent of the Unit does not speak, read, or write English.

Each of the employee witnesses who signed one of these pre-printed resignation/revocation forms testified they went to human resources on their own initiative and stated they no longer wanted to be part of the Union or no longer wanted to pay Union dues, and Acosta gave them a form to sign. There is no evidence Acosta said anything, or took any action, to encourage them to resign from the Union or revoke their dues-checkoff authorization.

After Acosta received an executed resignation/revocation form, she scanned and emailed it to Respondent's corporate office in New Jersey, because the corporate office handled payroll, including the deduction and remittance of Union dues. Acosta then placed the original executed form in the employee's personnel file. Respondent did not provide the Union with copies of these executed forms. (Tr. 555–556).

Usually within a month or two, Respondent's corporate office ceased deducting and remitting dues for those employees who signed a resignation/revocation form. The monthly lists Respondent provided to the Union of employees for whom Respondent deducted dues and remitted to the Union reflect that from July through December 2018 Respondent did not deduct and remit dues for those employees who executed a resignation/revocation form. (GC Exhs. 13 and 21).

b. Non-Disclosure of Confidential Employment Information Forms

Beginning in January 2018, and continuing through July 2018, human resources manager Lidia Acosta and her assistant, Dinora Murillo, began circulating forms entitled "Request for Non-Disclosure of Confidential Employment Information" for employees to sign. This form, which was in English, stated:

> I understand that Noah's Ark Processors, LLC ("employer") has information regarding my employment not generally available or known to the public. I understand that such information is confidential information safeguarded by my employer. Such confidential information includes:
>
> Personal (social security number, address, date of birth, marital status);
>
> Hiring (job application, resume, interview notes, employment history, employment assessments, background checks, reference checks, I-9 forms);
>
> New-Hire Paperwork (offer letters, employment contracts, handbook and policy acknowledgments);
>
> Performance (performance reviews, performance documentation, documented recognition, warnings and disciplinary notices, job descriptions, documented job changes/promotions);
>
> Compensation and Benefits (salary or hourly pay rates, merit increases and bonuses, other forms of pay, pay changes, benefit information);
>
> Payroll (time card sheets, work schedules, pay stubs, direct deposit forms, authorization for deducting or withdrawing pay, tax forms, status change forms);

[7] The Union filed a grievance which went to arbitration on April 25, 2018. On June 25, 2018, the arbitrator ruled in the Union's favor, but Respondent continued to deny the Union access to the facility. The Union then sought enforcement of the arbitrator's decision in federal district court. On January 28, 2019, the federal district court enforced the arbitration decision. (Jt. Exh. 24). During this period, and as of the hearing, Respondent barred all Union representatives from accessing the facility. (Tr. 590). This denial of access is not alleged as an unfair labor practice.

> Termination (termination or layoff records, resignation letter, unemployment insurance claim); and
>
> Attendance (dates and reasons for absence, time off, and leaves).

I request that this confidential information concerning my employment with the employer not be disclosed without my prior written consent. I understand that the employer may be required to disclose such confidential information in accordance with federal and state laws.
(Jt. Exh. 13).

Acosta received these non-disclosure forms from Respondent's attorney, Jerry Pigsley, in early January 2018, and she was told to circulate them among the employees. (Tr. 558).[8] Within a day or two, Acosta and Murillo went out into the work areas and began approaching Unit employees about signing the form. They asked employees whether they authorized Respondent to share their personal information with others. If the employees said "no," Acosta or Murillo would have them sign a non-disclosure form. (Tr. 559-560). Certain employees inquired about who would be asking for their information, and Acosta identified the Union as one that could ask, but she did not mention that the Union had, in fact, asked for this sort of information. (Tr. 560). The first form was signed and dated by a Unit employee on January 8, 2018, and employees continued to sign the forms through July 2018. (Jt. Exh. 13, pg. 36). In total, Respondent collected signed non-disclosure forms from approximately 50 employees. (Tr. 562). Respondent offered no explanation for why it created and began circulating the non-disclosure form for Unit employees to sign.

Respondent did not limit itself to asking employees if they voluntarily wanted to sign the non-disclosure form. The General Counsel presented several employee witnesses who were told they were required to sign the form. Aramis Hernandez-Acosta was a Spanish-speaking Unit employee who went to human resources because he wanted to resign from the Union and withdraw his dues-checkoff authorization. He did this in late February 2018. He was later told by his supervisor, Joel Murillo, that he had to go to the human resources office because they wanted him to sign a document. (Tr. 363). Hernandez-Acosta then went to the human resources and met with Lidia Acosta. The two spoke in Spanish. Hernandez-Acosta first asked Acosta whether she was going to fire him, and she told him there was no reason to fire him. Acosta then told him that "somebody" wanted his "information." She did not explain who that "somebody" was or what "information" they wanted. She handed him the non-disclosure form—which was in English—and told him to sign it. (Jt. Exh. 13, p. 1) (Tr. 363-364). She did not translate the document or explain what it said. Hernandez-Acosta then signed the form. (Jt. Exh. 13, p. 1).

In early July 2018, Juvencio Ramirez De la Cruz[9] was another Spanish-speaking Unit employee who went to human resources to resign from the Union and revoke his checkoff authorization. A couple days after he went and signed a resignation/revocation form, he was contacted by Dinora Murillo who told him he needed to sign a copy of the nondisclosure form in order to complete his Union resignation/revocation transaction. (Tr. 401) (Jt. Exh. 13, p. 32). She did not translate the document or explain what it said. (Tr. 403). De la Cruz signed the form.

In early July 2018, Marcial Torres-Santiago, another Spanish-speaking Unit employee, went to human resources to resign from the Union and revoke his checkoff authorization. He met with Lidia Acosta, who provided him with a pre-printed resignation/revocation form. She also provided him with a copy of the non-disclosure form and told him he had to sign it. (Tr. 448-450). Torres-Santiago signed the non-disclosure form as instructed. (Jt. Exh. 13, p. 38).

After obtaining the nondisclosure forms, Acosta and Murillo put them in a separate folder. They were not placed in the employees' personnel files. When asked why she kept the signed non-disclosure forms separate, Acosta replied, "I do not know." (Tr. 563). Like the signed resignation/revocation forms, Respondent did not provide the Union with copies of the employees' signed non-disclosure forms.

c. September 2018 Solicitation and Interrogation

In around September 2018, Celesta Sanchez, a Union steward/employee, observed Lidia Acosta approach two Unit employees out on the work floor, with "a booklet" and some papers. The two employees were Richard and Veronica (last names unknown). Sanchez could not hear what was said. She asked her supervisor, Karen Mendoza, what Acosta was doing. Mendoza said Acosta was giving the two employees forms to withdraw from the Union because they had gone to the human resources office to resign from the Union. (Tr. 383–384; 393). There was no other evidence presented regarding these alleged conversations.

Later, Sanchez saw Acosta approach two other employees, Gina (last name unknown) and Torres (unknown if that was the person's first or last name), with a "booklet" and papers in her hand. Again, Sanchez could not hear what Acosta was saying, and she could not see what the documents were in her hand. Sanchez also did not see Gina or Torres sign the documents. (Tr. 385-386). There was no other evidence presented regarding these alleged conversations.

2. Allegations and Analysis

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act: (1) on various dates since January 23, 2018, when Respondent, through Lidia Acosta and Dinora Murillo, provided employees with pre-printed forms to resign from the Union and to revoke their dues-checkoff authorization; (2) on various dates since January 23, 2018, when Acosta and Murillo coerced employees into signing pre-printed forms prohibiting Respondent from disclosing an employee's employment information without written consent; and (3) on about September 2018, when Acosta solicited employees to resign from the Union and interrogated employees about their support for the Union.

[8] The transcript incorrectly states Acosta testified she received the form from "Gary." (Tr. 558).

[9] The transcript spells the witness's name as "Javenceo," but the exhibits spell it as "Juvencio." The latter appears to be the correct, or at least the more common, spelling of the name.

(GC Br. 14-24).[10]

a. Pre-printed Union Resignation and Revocation of Dues-Checkoff Form

The first allegation concerns Respondent's creation and distribution of the pre-printed resignation/revocation forms. The Board has held employers may provide employees with assistance about resigning their union membership and withdrawing their dues-checkoff authorization without violating the Act, as long as the assistance it provides concerns the procedures or mechanics of doing so and does not rise above mere "ministerial" assistance. However, an employer may not attempt to ascertain whether employees will avail themselves of the right to resign or withdraw authorization, or otherwise create a situation where employees would reasonably feel in peril by refraining from resigning or withdrawing checkoff authorization. *Space Needle, LLC*, 362 NLRB 35, 36 (2015). The Board has provided some guidance for how an employer may and may not assist its employees in this regard. Compare *Narricot Industries,* 353 NLRB 775, 776 (2009) (employer provided more than permissible ministerial aid where an employee asked his HR director "how to oust the union" and the director prepared a petition for the inquiring employee, as well as, two other employees, telling them the number of signatures needed and directing them to return the petitions to him daily); *Florida Wire & Cable*, 333 NLRB 378, 381 (2001) (employer provided more than ministerial aid when it gave employees advice on how to resign from the union, displayed sample resignation letters at a meeting with employees, and, mailed sample letters to employees); *Manhattan Hospital*, 280 NLRB 113, 115 (1986) (employer which solicited resignations from the union, evidenced a continuing interest in knowing if employees intended to resign their union membership, and, in some instances offered assistance, was engaging in conduct aimed at causing disaffection from the union and unlawfully interfered with employees' free exercise of their Section 7 rights); *Erickson's Sentry of Bend*, 273 NLRB 63, 64 (1984) (employer acted unlawfully when store manager, upon request of an employee, provided language for a petition to resign from the union, which the employee copied, signed and gave to the manager in the manager's office; and, the manager discussed with the employee which other employees the manager might approach about resigning from the union, calling those employees to his office; thereby, giving the appearance the employer favored the petition, and, encouraged the employees to sign the petition); *Rock-Tenn Co*., 238 NLRB 403, 404 (1978) (employer provided unlawful assistance by telling employee his failure to submit a dues-checkoff revocation would leave him one of a very small number of employees who continued to authorize the checkoff of union dues, because it was an attempt to influence the employee to jump on the "bandwagon" and join the purported nearly unanimous group of employees who had revoked their checkoff authorizations); and *Winn-Dixie Stores, Inc*., 128 NLRB 574, 588 (1960) (employer acted unlawfully when it prepared a form resignation from the union letter, addressed the envelopes to send the letters, and, saw to the mailing of the resignation letters to the union); with *Mississippi Chemical Corp*., 280 NLRB 413, 419 (1986) (employer provided no more than ministerial aid by drafting letter for employee to sign renouncing the union after employee expressed disenchantment with the union during conversation with supervisor); *Peoples Gas System*, 275 NLRB 505 (1985) (employers issued letters to union members just prior to contractual window period for revoking dues-checkoff authorization, pointing out the revocation provision and dates. In both cases, the letters reassured employees that the employer was not urging employees either to remain union members or to resign from the union and that their choice would have no effect on their wages, benefits, or treatment); *Jimmy-Richard Co., Inc*., 210 NLRB 802, 804 (1974) (employer only provided ministerial aid when it prepared and typed letters for employees to deliver to the union rescinding their union authorization during organizing effort after those employees approached employer about withdrawing authorization); and *Payless Drug Store of Port Angeles, Inc*., 210 NLRB 134, 136 (1974) (employer acted lawfully when it prepared forms for employees to sign if they wanted to resign from the union and informed employees of those forms during meeting, after employees inquired about how to resign from the union).

In this case, each witness who signed a pre-printed resignation/revocation form testified that they, not Respondent, initiated the process. They went to human resources on their own, stated they no longer wanted to be part of the Union and/or pay Union dues, and Acosta or Murillo provided them with a copy of the pre-printed resignation/revocation form to sign. There is no evidence Acosta or Murillo said or did anything else to question or encourage the employees about signing the form. Under Board precedent, I find Respondent's sole act of providing employees with this pre-printed form in response to their unsolicited statements of disaffection and desire to disassociate from the Union and cease checkoff authorization is nothing more than ministerial assistance.[11] I, therefore, recommend dismissing the

[10] Subpar. 5(c) of the second consolidated complaint alleges since January 23, 2018, on various dates, Respondent, by Lidia Acosta, Dinora Murillo, Mary Junker, Joel Murillo, Jose Madrigal, Karen Mendoza and other supervisors and agents presently unknown to the General Counsel, at Respondent's facility violated Sec. 8(a)(1) when it: (1) solicited employees to resign from the Union and cease paying Union dues; (2) provided employees with pre-printed forms to resign from the Union and to revoke their dues checkoff authorizations; (3) interrogated employees about their support for the Union; and (4) coerced employees into signing pre-printed forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent. Counsel for General Counsel presented evidence at hearing, and argued in its post-hearing brief, that Acosta and Dinora Murillo engaged in the above unlawful conduct, but it did not argue in its post-hearing brief that Mary Junker, Joel Murillo, Jose Madrigal, Karen Mendoza, or another supervisor or agent of Respondent engaged in the above conduct. Based on my review of the record, I find no evidence these other individuals engaged in the conduct listed. In the absence of evidence and argument, I recommend dismissing the allegations in this subparagraph involving individuals other than Acosta and Dinora Murillo.

[11] The General Counsel argues Respondent acted improperly by initially only providing these forms in English, without translation, when 80 percent of the employees in the unit, including the employee witnesses at issue, could not read, write, or understand English. General Counsel cites no authority for support. Regardless, I find Respondent did not misrepresent what the document said or the effect it would have.

allegation.

b. Nondisclosure of Confidential Employment Information Form

The second allegation concerns Respondent's creation and distribution of its non-disclosure of confidential employment information form. Unlike with the resignation/revocation form, where employees initiated the dialogue, Respondent, through Lidia Acosta and Dinora Murillo, sought out employees and told them to sign the non-disclosure form if they did not want their information released to others, including the Union, without their written consent. Additionally, Acosta and Murillo required employees who signed the resignation/revocation form to also sign the non-disclosure form.

The General Counsel argues, and I am persuaded, that Respondent created this non-disclosure form and solicited employees to sign it in response to the Union's request(s) for information. I base this conclusion on three factors. First, there is the timing. The Union made its initial request for information on November 6, 2017, and then reiterated that request on December 27, 2017, and again on January 5, 2018. Respondent prepared and began distributing the non-disclosure form in early January 2018. As stated, in February 2018, when Acosta spoke to Hernandez-Acosta about signing the non-disclosure form, she told him that "somebody" wanted his "information." Although she did not say who this "somebody" was, their conversation followed the Union's request(s) for information about the Unit employees. Second, there is the scope. As stated, the Union's information request(s) seeks various documents related to the Unit employees' wages, hours, benefits, and other terms and conditions of employment. The non-disclosure form lists as "confidential" many of the same type of documents the Union was seeking in its request(s), including those arguably falling within the Hiring, New-Hire Paperwork, Performance, Compensation and Benefits, Payroll, or Attendance categories. Finally, Respondent failed to articulate any reason or justification for why and when it created and began circulating this form. There is no evidence in the record that employees raised issues about the disclosure of their employment information, or that Respondent was responding to some other legitimate concern.

Moreover, Respondent did not simply create and circulate these non-disclosure forms—it required employees to sign them, going so far as to falsely claim that employees had to sign the form in order for Respondent to effectuate their Union resignation/revocation of dues-checkoff authorization.

Under these circumstances, I find Respondent violated Section 8(a)(1) of the Act when it created, circulated, and required employees to sign this non-disclosure form.

c. Solicitation and Interrogation Allegations

The final issue concerns Acosta's alleged September 2018 solicitation of employees to resign from the Union and alleged interrogation of employees about their support for the Union. As stated, an employer may not solicit or encourage employees to resign from their union or revoke their dues-checkoff authorization. See *Albert Van Luit & Co.*, 229 NLRB 811, 813 (1977), enfd. 597 F.2d 681 (9th Cir. 1979) (solicitation of checkoff revocations unlawful); *Hexton Furniture Co.*, 111 NLRB 342, 345 (1955) (solicitation of membership resignations unlawful). Also, except in limited circumstances not present here, an employer may not interrogate an employee regarding their support for their union. In assessing the lawfulness of an interrogation, the Board applies the "totality of circumstances" test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the employer's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007). The *Rossmore House* factors are not to be "mechanically applied" and it is not essential that each element be met. The core issue is whether the questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. This is an objective standard. *Multi-Aid Service*, 331 NLRB 1126 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The General Counsel bears the burden of proof.

In this case, the General Counsel attempts to meet its burdens exclusively through the testimony of Celesta Sanchez. As stated, Sanchez testified she saw Acosta approach and speak to four employees (Richard, Veronica, Gina, and Torres) out on the work floor, with a "booklet" and papers in her hand, but she did not hear what was said. Sanchez spoke with her supervisor, Karen Mendoza, who stated Acosta was talking to Richard and Veronica about resigning from the Union, because they had gone to the human resources office looking to resign from the Union. Without evidence about what was said between Acosta and these other employees during these exchanges, I find the General Counsel cannot meet his burdens. I, therefore, recommend dismissing this allegation.

C. Failure to Remit Employee Dues

1. Factual Summary

Article 2 of the parties' collective-bargaining agreement, entitled "Maintenance of Membership/Dues Checkoff," states, in pertinent part, that: "The company will withhold from the employee's pay such amounts for union dues and initiation fees *as the employee has authorized in writing*. Such amounts shall be withheld weekly and be remitted to the office of the Local Union on a monthly basis." (Jt. Exh. 1, p. 1) (emphasis in original). As stated, the Union provides Respondent with a copy of each employee's signed dues-checkoff authorization form, and Respondent stores a copy of that form in the employee's personnel file. The form states the authorization shall be irrevocable for a period of 1 year from the date of execution, or until the termination of the collective-bargaining agreement, whichever occurs sooner, unless the employee gives Respondent and the Union written notice of revocation not fewer than 30 days and not more than 45 days prior to the end of any subsequent yearly period or the termination of the collective bargaining agreement, respectively.

Respondent ceased deducting and remitting dues for over 50 Unit employees who submitted their union resignation and

revocation of dues-checkoff authorizations between January and July 2018.[12] In processing those revocations, Lidia Acosta testified human resources did not look at the employees' dues-checkoff authorization forms to determine whether the revocations were timely. (Tr. 556). The record reflects that several of these revocations were untimely. There is no dispute Respondent did not notify, discuss, or bargain with the Union before it ceased deducting and remitting dues to the Union for those employees who submitted untimely revocations. Respondent also did not obtain the Union's consent before, during the life of the agreement, it stopped following Article 2's requirement that it withhold and remit dues consistent with the employee's written authorization, which remains valid unless timely and properly revoked.

2. Allegations and Analysis

The General Counsel alleges that since January 23, 2018,[13] Respondent has violated Section 8(a)(5) and (1) of the Act when it failed and refused to deduct and remit to the Union dues pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct and/or without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement. The General Counsel also alleges Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act when it engaged in this conduct, without the Union's consent, between January 23, 2018 and January 28, 2018, while the parties' collective-bargaining agreement remained in effect.[14] The General Counsel further alleges Respondent independently violated Section 8(a)(1) of the Act by this conduct.[15]

Sections 8(a)(5) and 8(d) of the Act prohibit an employer from modifying terms and conditions of employment established by a collective-bargaining agreement during the agreement's term without the union's consent. See, e.g., *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 2 (2017); *Oak Cliff-Golman Baking Co*., 207 NLRB 1063, 1063–1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). When an employer defends against a midterm contract modification allegation by arguing the contract did not prohibit the challenged action, the Board will not ordinarily find a violation if the employer's contractual interpretation has a "sound arguable basis." *Bath Iron Works Corp*., 345 NLRB 499, 501–502 (2005), enfd. sub nom. 475 F.3d 14 (1st Cir. 2007).

Absent a valid defense, Section 8(a)(5) also prohibits an employer from making a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union with prior notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Alamo Cement Co*., 281 NLRB 737, 738 (1986). Following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Richfield Hospitality, Inc*., 368 NLRB No. 44, slip op. at 2 (2019) (citing *Triple A Fire Protection, Inc*., 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999)). Stated another way, absent exigent circumstances, when parties are engaged in contract negotiations, an employer must refrain from making unilateral changes in unit employees' terms and conditions of employment absent an overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc*., 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

Under Board law, dues checkoff is a mandatory subject of bargaining. *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1656-1657 (2015). An employer's refusal to deduct and remit dues under a valid dues-checkoff authorization constitutes a unilateral change in terms and conditions of employment, in violation of Section 8(a)(5) of the Act. *Merryweather Optical Co*., 240 NLRB 1213, 1215 (1979); *Western Block Co*., 229 NLRB 482 (1977); and *Cavaler Spring Co*., 193 NLRB 829 (1971). The Board also has held an employer violates Section 8(a)(5) by ceasing to deduct and remit dues in derogation of an existing contract. *Hearst Corp. Capitol Newspaper Div*., 343 NLRB 689, 693 (2004); and *Shen-Mar Food Products, Inc*., 221 NLRB 1329, 1333 (1976), enfd. in relevant part 557 F.2d 396 (4th Cir. 1977).

In *Shen-Mar Food Products, Inc*., the Board was confronted with similar facts. During the life of the contract, the employer ceased deducting and remitting dues for 9 employees who resigned from the union but untimely cancelled their dues-checkoff authorizations. The checkoff provision in the parties' agreement stated: (1) the employer agreed to checkoff and remit monthly dues and initiation fees to the union for those employees who so authorized; (2) the union agreed to furnish the employer with the employees' individual dues-checkoff authorization forms; (3) the union would indemnify and save harmless the employer from any and all claims and disputes associated with the deductions and remittance pursuant to those authorizations; and (4) the employer agreed to furnish a monthly list to the union showing all newly hired employees who passed the trial period, or who were laid off or discharged. The checkoff authorization forms the employees signed set out the requirements to timely revoke their authorization (i.e., written revocation sent registered mail to both the employer and the union within the established timeframe).

The Board held that because the parties' agreement required the union to furnish the employer with the employees' checkoff authorization forms, the employer knew the attempted

[12] At least two employees (Wisdaly Rojas Navarro and Georgina De La Torre) submitted untimely revocations in the period between January 23–28, 2018, which Respondent processed.

[13] The Union filed the unfair labor practice charge containing these allegations (Case 14–CA–224183) on around July 23, 2018. As a result, the Sec. 10(b) period goes back to January 23, 2018, and while there is evidence Respondent effectuated untimely revocations prior to that date, the second consolidated complaint only alleges as unlawful the conduct occurring on or after January 23, 2018. However, events preceding the Sec. 10(b) period are properly considered to lend context to events within the 10(b) period. See *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 414–429 (1960).

[14] Subpar. 10(b) of the second consolidated complaint.

[15] Subpar. 5(d) of the second consolidated complaint.

revocations were untimely and, therefore, invalid. The Board found the employer's failure to deduct and remit dues from those who did not timely revoke their authorizations constituted an unlawful infringement upon Section 7 rights, in violation of Section 8(a)(1), and it breached the employer's duty to bargain, in violation of Section 8(a)(5). The Board additionally found that, where an employer ceases to deduct and remit dues in derogation of an existing contract, it is changing the employees' terms and conditions of employment, in violation of Section 8(a)(5). 221 NLRB at 1329–1330.[16]

Although Article 2 does not explicitly require that the Union provide Respondent with the employee's individual dues-checkoff authorization, it does require that Respondent withhold and remit dues "*as the employee has authorized in writing*." The employee's signed checkoff authorization form is his/her written authorization. Once executed, the employee's checkoff authorization remains in effect until timely and properly revoked. The Union provides Respondent with a copy of each Unit employee's signed checkoff authorization form, and Respondent retains that copy in the employee's personnel file. Thus, upon receiving an employee's written request to cancel checkoff, Respondent has both the information and obligation to verify the request it received falls within the timely revocation period before it is permitted to cease deducting dues from the employee's paycheck and remitting them to the Union. As previously stated, several of the revocations Respondent processed were untimely.[17] For those employees, their checkoff authorizations remained valid and in effect, and Respondent was obligated to continue deducting and remitting their dues to the Union.

Respondent has offered no defense to these allegations--contractual or otherwise. In fact, Respondent does not mention these allegations in its post-hearing brief. Respondent does not contest its failure to notify or bargain with the Union over making the change, or its failure to obtain the Union's consent before modifying the contractual revocation process while the agreement was in effect.

Based on the foregoing, I find Respondent's unilateral change to the revocation process since January 23, 2018, without providing the Union with notice or an opportunity to bargain over the decision or its effects violated Section 8(a)(5) and (1). I further find Respondent's failure to obtain the Union's consent before modifying the contractual revocation process by processing untimely revocations while the agreement remained in effect, from January 23, 2018, to January 28, 2018, violated Section 8(a)(5) and (1) within the meaning of Section 8(d). Finally, I find this conduct constitutes an independent unlawful infringement upon employees' Section 7 rights, in violation of Section 8(a)(1).

D. Changes to Wage Rates

1. Factual Summary

Article 12 of the parties' agreement, entitled "Rates of Pay Provision," sets forth the negotiated wage rates for all Unit employees. Rates are based on job classifications, and most of the Unit classifications are divided into five groups. According to the agreement, the starting wage rate for classifications in group 1 is $9/hour; the starting wage rate for those in group 2 is $9.50/hour; the starting wage rate for those in group 3 is $10/hour; the starting wage rate for those in group 4 is $10.50/hour; and the starting wage rate for those in group 5 is $11/hour. There are separate wage rates for maintenance crew members and electricians. In addition to the starting wage rates, the parties negotiated a set schedule for wage increases during the life of the agreement. The first increase occurred on January 28, 2013, when all regular full-time employees in groups 1-5 received a $.30/hour increase. The employees were eligible for this increase as long as they had completed their 60-day probationary period. (Tr. 101). Thereafter, employees in groups 1-5 earned a $0.15/hour increase, in accordance with the set schedule, as long as they passed their 60-day probationary period as of the date of the increase. The scheduled $.15/hour wage increases occurred on July 29, 2013, January 27 and July 28, 2014, January 26, and July 27, 2015, January 25 and July 25, 2016, January 30 and July 31, 2017. The exception to this schedule was for a group of approximately 28 job classifications (listed in the agreement) that received a one-time $2/hour increase effective January 28, 2013, and no other increases during the life of the agreement. (Jt. Exh. 1).[18]

As stated, Article 12 of the parties' agreement sets forth the scheduled wage increases, and the last increase was to occur on July 31, 2017. Respondent, however, continued to pay $.15/hour increases to Unit employees in January and in July 2018. (GC Exhs. 22–25). Respondent did not notify or discuss with the Union before continuing to pay these wage increases beyond what was set forth in the agreement.

On around August 23, 2018, Respondent unilaterally implemented an entirely new wage rate system resulting in wage increases of between $2-$3/hour for all Unit employees. (GC Exh. 4). The new wage schedule identifies 5 groups of job classifications. Those groups are identified as: light, medium, medium/heavy, heavy, and super/heavy. Classifications in the light group earned $12/hour; classifications in the medium group earned $13/hour; classifications in the medium/heavy group earned $14/hour; classifications in the heavy group earned $15/hour; and classifications in the super/heavy group earned $16/hour. Respondent began paying Unit employees in accordance with this new wage system in around August 2018. It did not notify or bargain with the Union before creating and

[16] The Board reaffirmed *Shen-Mar Food Products* in *County Concrete Corp*., 366 NLRB No. 64 fn. 1 (2018).

[17] The General Counsel also argues the revocations were procedurally deficient because Respondent failed to provide copies to the Union. I reject this argument. The checkoff-authorization form states *the employee*, not Respondent, is required to provide the Union with signed written notice of revocation.

[18] In around late January 2017, Respondent unilaterally instituted a new wage scale, set forth in Jt. Exh. 21. Respondent did not notify or discuss with the Union before implementing these different wage rates. The unfair labor practice charges at issue do not encompass the implementation of these changes because they occurred outside the Section 10(b) period, but, as stated, they can be considered to lend context to events within the 10(b) period. See *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, supra.

implementing this system.[19]

2. Allegations and Analysis

The General Counsel alleges that since January 23, 2018, and on various dates, Respondent has violated Section 8(a)(5) and (1) of the Act when it changed Unit employees' hourly wage rates and paid those new rates without prior notice to the Union and/or without affording the Union an opportunity to bargain over the change and its effects and/or without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement. The General Counsel also alleges Respondent violated Section 8(a)(5) and (1) within the meaning of Section 8(d) when it engaged in this conduct, without the Union's consent, when the parties' agreement remained in effect between January 23, 2018 and January 28, 2018.[20] In its post-hearing brief, the General Counsel argues Respondent specifically violated the Act within the Section 10(b) period when it continued to pay the $.15/hour wage increases to Unit employees after the final scheduled increase on July 31, 2017, in January and July 2018, and, later, when it created and implemented the new wage system/rates in August 2018.

As stated, wages are a mandatory subject of bargaining. *NLRB v. Katz*, supra. A unilateral wage increase without providing the union notice and opportunity to bargain violates Section 8(a)(5) and (1). *Liberty Bakery Kitchen, Inc*., 366 NLRB No. 19, slip op. at 11 (2018). There is no dispute Respondent continued to pay the $.15/hour wage increases to Unit employees beyond the final negotiated July 31, 2017 increase, in January and July 2018, and it created and implemented the new wage system/rates in August 2018. The General Counsel established that Respondent engaged in this conduct, without providing the Union with prior notice and an opportunity to bargain, while the parties were in the process of negotiating a successor agreement.[21] The General Counsel also established that Respondent failed to notify or bargain with the Union over these matters, or that it failed to notify and receive the Union's consent before modifying the contractual wage rates by continuing to pay the increases while the parties' agreement remained in effect in late January 2018. Respondent has offered no defense to these allegations--contractual or otherwise. In fact, like the changes to dues checkoff, Respondent does not mention these allegations in its post-hearing brief.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) when it unilaterally continued to pay the $.15/hour wage increases in January and July 2018, and when it created and implemented the new wage system/rates in August 2018, without providing the Union with notice or an opportunity to bargain over the decision or its effects. I further find Respondent's failure to obtain the Union's consent before modifying the contract to pay the $.15/hour wage increases between January 23, 2018 and January 28, 2018, violated Sections 8(a)(5) and (1) within the meaning of Section 8(d).[22]

E. March 2018 Safety Meeting

1. Factual Summary

On around March 2018, Respondent held an employee safety meeting attended by supervisors Paul Hernandez, Chris Kitch, Karen Mendoza, and Lidia Acosta. The General Counsel called employee Celesta Sanchez to testify about this meeting. Her testimony, through translation, was as follows:

Q: What happened at the safety meeting, March of 2018?
A: While there, and when they asked for a raise, Pablo said there was no union.
Q: Who asked for a raise?
A: A lot of times we were saying we want a raise.
Q: Okay. And Pablo's response was there is no union; did I hear that right?
A: He said there's no union in the plant.
Q: Okay. After Pablo said that, did anyone respond?
A: Yes.
Q: And who was that?
A: One guy said if there is no union, why are they taking dues out of the checks.
Q: Did any supervisor or Lidia -- I know she's – did anyone from Personnel or any supervisor respond to that?
A: Pablo.
Q: What did Pablo say?
A: There was not an agreement with the Union.
Q: Okay. Did Pablo say anything else about the Union?
A: He said there was talks with the Union.
Q: You had mentioned that Pablo had said that there was no union in the plant.
A: Yes.
Q: Did he say anything else about the Union going forward?
A: He said they were going to talk with the Union because the Company didn't have a Union; they didn't allow them.
Q: Did he say anything else that the Company was going to do with respect to the Union?

[19] At the hearing, Respondent's counsel asserted Respondent notified the Union about this new wage rate system, but he failed to present any evidence as to how or when the Union was notified about this change.

[20] Subpar. 10(a) of the second consolidated complaint.

[21] In *Richfield Hospitality, Inc*., 368 NLRB No. 44 (2019) and *Wilkes-Barre General Hospital*, 362 NLRB 1212 (2015), the Board held it was a violation of Sec. 8(a)(5) for the employer to cease paying longevity-based wage increases post-contract expiration because the contracts in those cases did not address whether the employees would continue to receive those raises after expiration; therefore, the employers had an obligation to maintain the status quo post expiration by continuing to pay the increases. Here, the parties' agreement had a set schedule for the wage increases, and the last increase was on July 31, 2017. I therefore do not find Respondent was maintaining the status quo by continuing to pay these $.15/hour increases in January and July 2018.

[22] The General Counsel served a pre-hearing subpoena *duces tecum* on Respondent seeking personnel documents for Unit employees, in part, to establish the timing, amount, and, if any, reasons for the wage increases. After Respondent failed to produce this information at the hearing, the General Counsel sought evidentiary sanctions, which I denied. Without waiving his position, the General Counsel agreed to a sampling arrangement whereby Respondent would provide the requested information for representative Unit employees. The sampling showed several Unit employees received wage increases that differed from the contractual increases, in both timing and amount. As stated, I find the General Counsel has proven the wage allegations, and, therefore, was not prejudiced by my ruling.

A: That they were going to get rid of them.

…

Q: Do you remember anything else that Pablo said about the Union?

A: No.

(Tr. 389-392).

2. Allegations and Analysis

The General Counsel alleges in its post-hearing brief that in about March 2018, Respondent, by Paul Hernandez, in the cafeteria at Respondent's facility, violated Section 8(a)(1) of the Act when he told employees present for a meeting that there was no union at the facility, Respondent did not allow a union at the facility, Respondent was going to get rid of the Union, and when Respondent removed the Union, employees could get a raise.[23]

The Board has held such statements—when credited—to be unlawful. See e.g., *Roemer Industries, Inc.*, 367 NLRB No. 133 (2019) (violation when management official threatened to get rid of the union); *Windsor Convalescent Ctr.*, 351 NLRB 975, 987–988 (2007), enfd. in relevant part, 570 F.3d 354 (D.C. Cir. 2009) (manager stated there was no union at the facility); *Scandia Stucco Co.*, 319 NLRB 850, 857 (1995) (manager stated company was going nonunion); *and Libby-Owens-Ford Co.*, 285 NLRB 673 (1987) (employer stated benefits would not be offered because of the union).

However, I do not credit Sanchez' testimony about this meeting. Her demeanor and tone reflected a lack of confidence and clarity in her recollection. Her responses were inconsistent, illogical, and, at times, contradictory. For example, she initially testified Hernandez said, "there was no union." She then clarified he said, "there's no union at the plant." But moments later, she testified Hernandez said, "there was not an agreement with the Union" and the company was in "talks with the Union." Later, she stated he said, "they were going to talk with the Union because the Company didn't have a Union; they don't allow them." And when asked what Hernandez said the company said was going to do with respect to the Union, Sanchez recalled he told them they "were going to get rid of them [referring to the Union]."

The General Counsel also failed to offer any corroborative evidence regarding these alleged statements.[24] This was puzzling because it was a safety meeting where other employees were present, and one or more of those employees could have been called to testify about what was said. See *Electric Hose & Rubber Company,* 228 NLRB 966, 970 (1977) (General Counsel's failure to call other potentially available witnesses present for meeting to hear supervisor's allegedly unlawful statements "creates the compelling inference that no such statement was ever made.")

Respondent presented Hernandez, Kitch, Mendoza, and Acosta. Each denied Hernandez, or any supervisor or manager, made any of these alleged statements at any meeting. While I generally give less weight to these types of specific denials, I find their separate denials to be consistent and reliable.

Based on the lack of credible evidence, I find the General Counsel has failed to meet his burden. I, therefore, recommend dismissing these allegations.

F. March 27, 2018 Work Stoppage, Threats, and Discharges

1. Factual Summary

On March 26, 2018, Guadalupe Ortiz, a packaging employee, and approximately seven other employees on her line learned that at least one newer employee in their department was earning more per hour than they were. Under the collective-bargaining agreement, employees who remained in the same classification received increases based on their longevity, which meant a newer employee could not earn more per hour than a more senior employee. Ortiz and the others decided that the following morning they would all arrive for work, get their supplies from the supply room, go up to the cafeteria, and wait to speak with a higher-level manager about the wage disparity and about getting a raise. The employees decided that Ortiz would be the spokesperson for the group because she spoke Spanish and English, and she could translate for them. While the employees were discussing their plan, their supervisor, Joel Murillo, was nearby, and he commented to Ortiz "don't do what you want to do." (Tr. 259). Nothing else was said.

The following morning, Ortiz and the others on her line arrived for work, got their supplies from the supply room, and then headed up and sat in the cafeteria. Ortiz and others, as well as other employees, primarily from the packaging department, also arrived in the cafeteria at approximately 6:05 a.m. In total, there were about 20 employees there.

That morning, Joel Murillo noticed that several of the packaging employees were not on their line working. He asked around and learned they were up in the cafeteria. He went to the cafeteria and saw the employees sitting. Murillo reported this to his supervisors.

Chris Kitch later went to the cafeteria. He approached Ortiz and asked, in English, "What's going on? Why is everyone up here and not down on the floor working?" Ortiz responded, in English, that they wanted to know why raises were not given out and why people were making more than others. (Tr. 265). Kitch responded that it all had to do with the union contract. Ortiz translated what Kitch was saying into Spanish for the others. Kitsch informed Ortiz he was going to try and get the owner of the plant. Kitch then left the cafeteria. He was gone for approximately 15 minutes or so. He returned with Paul Hernandez.

[23] Subpar. 5(a) of the second consolidated complaint alleges that about March 2018, Respondent, by Paul Hernandez and Lidia Acosta, at Respondent's facility: (1) told employees that they were not represented by a union at the facility; (2) told employees that Respondent was going to remove the Union from the facility; (3) told employees that moving forward there would be no union at the facility; and (4) told employees that they would not receive a raise because of the Union. The General Counsel failed to present any evidence regarding Lidia Acosta attending or speaking at this meeting. I, therefore, recommend dismissing those allegations, as well.

[24] In its posthearing brief, the General Counsel asserts Kyle Anzualdo attended this March 2018 safety meeting, and he testified about Hernandez' statements. Anzualdo, however, testified about a meeting he attended in around December 2017, where Hernandez was the only supervisor or manager present. (Tr. 460–461). I, therefore, do not find that Anzualdo's testimony corroborated Sanchez regarding this March 2018 safety meeting.

Hernandez said to the group, in Spanish, "those who don't want to work can go home." (Tr. 269). After Hernandez said this, the group of employees got up and walked out of the cafeteria. Hernandez told Kitch to write down the names of the employees who left because he didn't want those employees back in the building. As the employees left the cafeteria to go into the hallway, Hernandez said, "you guys either go to work, leave now, or you're terminated." (Tr. 271). One group of employees went back to work. Another group went and returned their supplies to the supply room because they are not allowed to take supplies out of the building, and they then left the building and went out into the parking lot. There were 10 employees who went out into the parking lot: Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright.

Hernandez also went out into the parking lot. While the employees were in the parking lot, plant manager Mike Helzer came out to speak with them. He said, in English, that what they were doing violated the collective-bargaining agreement. (Tr. 273). Ortiz and the others did not know what he was talking about. Helzer then said that there could be a solution to the problem, and Ortiz translated that into Spanish for the others. Helzer said the employees could return to their workstations to work the rest of their shift, and then they could meet and discuss the problem after work. Ortiz translated this for the others, and the employees responded they were not willing to do that. The group said that if they went back into the building and worked that day, management would forget about the issue and they would not have a solution. (Tr. 274). Helzer then responded they had to leave the parking lot because the police would be there in 5 minutes. (Tr. 275; 738)

Hernandez told the employees, in Spanish, that if they were not willing to work, they needed to turn in their identification badges. (Tr. 275–276). These badges are used to get past the security gate, to enter the facility, and for timekeeping purposes—i.e., employees cannot work without them. The employees each turned in their identification badges to Hernandez. The employees asked Hernandez if they could wait for Lidia Acosta to arrive. Hernandez refused and told them to leave or he would call the police. (Tr. 484). The employees left. The police were not called.

After the group of employees left, they contacted the Union to report what happened. Several of the employees went to the Union hall to file a grievance, which the Union later submitted to Respondent.[25]

Later that morning, human resources manager Lidia Acosta learned what occurred and she had the supervisors involved prepare typed statements about what happened. In his statement, Paul Hernandez wrote the employees had gathered in the cafeteria that morning "because they had an issue with needing a raise." When the employees did not agree to return to work, Hernandez told them they would be considered terminated for quitting or terminated for not following a supervisor's instructions. (GC Exh. 16).

On March 30, 2018, Joel Murillo completed separation notices for the 10 employees who were discharged for walking out of the facility. (Jt. Exh. 16). For each of the employees, Murillo checked the boxes on the notice indicating "job abandonment" and "violation of company policy." He also checked the box for each of these employees indicating that they were "not expected to be recalled to work." Murillo testified he checked the "violation of company policy" box because the employees refused to go back to work. (Tr. 299). He checked the "not expected to recall to work" box because he believed that if "they do that one time (walking off the job), they can do it again." (Tr. 300).

At some point following their terminations, Brittney Spratt, Jimmy Deleon, Maria Diaz, and Sandra Diaz returned to the facility and asked to speak with Lidia Acosta about returning to work. Acosta stated they would need to prepare a written statement about what happened. The employees then prepared a handwritten statement, in Spanish, and Acosta then typed up and translated it into English. (Jt. Exh. 17). Respondent never reemployed any of the 10 employees who participated in the walkout.

2. Allegations and Analysis

The General Counsel alleges that on about March 27, 2018, Respondent violated Section 8(a)(1) of the Act when it discharged employees Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, because they engaged in concerted activities with other employees and each other for the purpose of mutual aid and protection, by concertedly requesting from Respondent explanations about wage discrepancies and demanding a wage increase.[26] The General Counsel also alleges Respondent, by Paul Hernandez and Mike Helzer, violated Section 8(a)(1) when they: threatened employees with termination for engaging in protected, concerted activities; told employees they were terminated for engaging in protected, concerted activities; and threatened to call the police because the employees engaged in protected, concerted activities.[27]

The Board has held that an employer violates Section 8(a)(1) when it discharges employees because they participated in a work stoppage to protest wage issues. *Atlantic Scaffolding Co*., 356 NLRB 835 (2011). In *Atlantic Scaffolding Co*., a group of unrepresented employees working on a refinery project prepared a letter demanding an increase in pay and per diem rate. The following day, a group of approximately 100 employees gathered outside and presented the letter to a supervisor. The managers discussed the demands with employees and asked them to return to work while the demands were under consideration. The employees refused. Another manager ordered the employees to be transported to the facility's parking lot. The employees complied and headed to the parking lot. As they exited the gate leading to the parking lot, the employer collected their identification badges and other equipment. While in the parking lot, the employees continued to discuss their pay demands with supervisors, who continued to urge them to return to work. After about an

[25] There is no evidence the Union opposed, or did not support, the group's work stoppage/walkout.

[26] Subpar. 6(a)-(c) of the second consolidated complaint.

[27] Subpar. 5(b) of the second consolidated complaint.

hour, security personnel told the employees they had to leave company property. Some left and others moved to a vacant lot across the street. Security later told the employees they had to leave the vacant lot because it also was company property. The employees complied. The following day, certain employees returned to work while others did not. A day later, the employer sent separation notices to all those employees who engaged in the work stoppage and did not return to work. The Board found the employees were discharged in violation of Section 8(a)(1) because they engaged in a protected work stoppage to protest their wages. As for the applicable analytical framework, the Board held as follows:

> [W]hen an employer asserts that employees were discharged because they would not return to work after commencing a work stoppage, the assertion suggests that the discharge was for engaging in the work stoppage itself. . . . In order to show that employees truly abandoned their jobs, an employer must present "unequivocal evidence of intent to permanently sever [the] employment relationship." . . . .
> Where . . . employees are terminated for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive. . . . Rather, when the conduct for which the employees are discharged constitutes protected concerted activity, "the only issue is whether [that] conduct lost the protection of the Act because . . . [it] crossed over the line separating protected and unprotected activity."

Id. at 838 (citations omitted).

In applying this framework, the Board held the employees never lost the Act's protection by remaining in the parking lot or vacant lot because they acted peacefully and complied with each of the employer's requests/demands that they relocate off company property. The Board also rejected the employer's argument that the employees abandoned their job, holding there was no evidence the work stoppage had ended—or that any employee had voluntarily quit—before the termination notices were sent. Id. at 838-839.[28] See also *Hy-Brand Industrial Contractors, Ltd*., 366 NLRB No. 94 (2018) (adopting judge's application of *Atlantic Scaffolding Co* to find employer unlawfully discharged employees for engaging in protected concerted work stoppages).

I find *Atlantic Scaffolding Co.* to be directly on point. Here, a group of employees also engaged in a protected, concerted work stoppage to protest wage disparities and demand increases to address the disparities. They peacefully gathered in the cafeteria, and later in the parking lot, looking to speak with members of management to address their collective concerns. At no point did the employees engage in any conduct causing them to lose the protection of the Act. On the contrary, aside from not returning to work, the group followed each instruction they received from management, including leaving the cafeteria, then leaving the parking lot, and, finally, turning in their identification badges.[29] Also, there is no evidence the employees ever intended to permanently sever their employment relationship. The testimony, Hernandez' email summary description of what occurred, and the termination notices establish that Respondent knew the employees were protesting wage matters and they were terminated because they engaged in this work stoppage/walkout and refused to return to work until their concerns were addressed.

In its defense, Respondent argues the work stoppage was unprotected because it violated Article 16 of the parties' collective-bargaining agreement, which prohibits the Union and its members from engaging in strikes, stoppages, slowdowns, or suspensions of work *during the term of the agreement*. The work stoppage, however, occurred two months after the agreement expired, and a no-strike clause is not enforceable to waive employees' right to conduct a work stoppage after expiration of the parties' agreement and during the bargaining for a successor agreement. See *Litton Financial Printing Division v. NLRB*, 501 U.S. at 198-199; *Industrial Hard Chrome Ltd.*, 352 NLRB 298, 311 fn. 11 (2008).

Respondent next argues the employees' conduct was unprotected because they were represented by the Union, and Respondent's obligation was to bargain with the Union over the employees' wages, not the employees themselves. This argument rings hollow for at least two reasons. First, the employees involved were, in effect, protesting that Respondent was not complying with the terms of the agreement because it was paying

[28] The Board also rejected that the work stoppage lost its protection because of the economic harm inflicted on the employer, holding the argument was antithetical to the basic principles underlying the statutory scheme, i.e., the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the "free play of economic forces" that should control collective bargaining. *Atlantic Scaffolding Co.,* 356 NLRB at 837 (quoting *NLRB v. Nash-Finch Co*., 404 U.S. 138, 144 (1971)). The Board held the "protected nature of the work stoppage in this case was not vitiated by the effectiveness of its timing." Id.

[29] In *Quietflex Mfg. Co*., 344 NLRB 1055 (2005), the Board set forth the following factors to determine if a work stoppage remained protected: (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged. 344 NLRB at 1056-1057. In *Atlantic Scaffolding Co*., the Board applied *Quietflex* and held the work stoppage remained protected at all times, finding that: the reason for the work stoppage, a protest over wages, was protected by Section 7; it was peaceful at all times and there was no cognizable interference with production; there was no attempt to deny anyone access to the property, or any challenge to the authority of the employer or contractor to control the property; the employees were never warned that they must leave or face discharge, instead, they promptly complied with each directive they were given to move from one location to another; and the reason advanced for the discharges likewise favors protection, as the employer did not raise a concern about property rights in notifying the employees of their termination. The same holds true in this case, with the exception that Hernandez threatened employees that they would be terminated if they did not return to work.

less-senior employees in their department more than them. The wage provision in the parties' agreement establishes employees' starting pay and any increases based on their classification and longevity (i.e., if you worked longer you received more of the periodic increases set forth in the agreement), meaning that a less senior employee, in the same classification, could not earn more than a more senior employee. An employer is required to maintain the status quo of all mandatory subjects of bargaining, including wages, until the parties either agree on a new contract or reach a good-faith impasse in negotiations. See *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 2. As already established, Respondent failed to maintain the contractual wage rates and unilaterally implemented changes without the Union's consent and without providing the Union with prior notice and an opportunity to bargain.

Second, the offer Helzer made to the group of employees in the parking lot was that if they returned to work, the company would meet *with them* after work and *discuss their wage concerns*. In effect, Helzer was offering to bypass the Union and deal directly with the employees about their wage concerns. As explained below, this all occurred the day before Respondent and the Union were scheduled to have their first bargaining session over a successor agreement.[30]

Based on the foregoing, I find Respondent discharged Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright because they engaged in a protected, concerted work stoppage to collectively protest their wage issues, in violation of Section 8(a)(1).

I also find that Respondent, through Hernandez and Helzer, violated Section 8(a)(1) with their statements in the cafeteria, the hallway, and in the parking lot. See *Accurate Wire Harness*, 335 NLRB 1096, 1097 (2001), enfd. 86 Fed. Appx. 815 (6th Cir. 2003); *Baddour, Inc.*, 303 NLRB 275 (1991). In the cafeteria, Hernandez told the employees that they could leave if they did not return to work, and he told Kitch to write down the names of the employees who left because he did not want them back in the building. When the employees moved to the hallway, Hernandez repeated his threat of termination, stating that they could return to work or they would be terminated. The Board held threatening employees with termination for engaging in a protected work stoppage violates Section 8(a)(1). *Central Valley Meat Co.*, 346 NLRB 1078 (2006). Hernandez later told the employees in the parking lot that they were being terminated and had to turn in their badges because of their conduct. He and Helzer separately threatened the employees that the police would be called if they did not leave the property. Under Board law an employer violates Section 8(a)(1) if it threatens to call the police in response to employees' protected activity at its facility. See *Meyer Tool, Inc.*, 366 NLRB No. 32 (2018). *Winkle Bus Co.*, 347 NLRB 1203, 1219 (2006).

G. Surveying Employees about Observance of Independence Day Holiday

1. Factual Summary

Article 9 of the parties' collective-bargaining agreement, entitled "Holidays," states that employees will be paid for recognized holidays (New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day) as long as they work their scheduled workdays before and after the holiday. The exceptions are if they are absent on one or more of their scheduled workdays for funeral leave, jury duty, approved vacation, or documented hospitalization. The agreement further states that all employees "required to work" on any of the holidays "shall receive time and ½ and holiday pay *or* shall receive another day with pay at the company's discretion." (Jt. Exh. 1, pg. 6) (emphasis added).

In around late June 2018, Respondent's supervisors/managers Mike Helzer, Paul Hernandez, Chris Kitch, Clay Irish, Karen Mendoza, Marulys Cisneros, Joel Murillo, and Jose Madrigal approached Unit employees and asked whether they wanted to observe the Independence Day holiday on July 4, or if they wanted to work July 4 and observe the holiday on Friday, July 6, allowing them to have a three-day weekend. (Jt. Exh. 18). Respondent surveyed several of the Unit employees, and a majority indicated they preferred to observe the holiday on July 6. Respondent never notified or consulted with the Union on this matter. Based on the survey, the employees all worked July 4 and were off July 6. There is no evidence Respondent previously surveyed employees about changing the observance date of a holiday. (Tr. 739).

2. Allegations and Argument

The General Counsel alleges that in about late June 2018, Respondent, through its supervisors, bypassed the Union and dealt directly with its employees by soliciting their preferences about moving the observance of the Independence Day holiday to July 6, 2018.[31] The criteria applied in determining whether an employer has engaged in direct dealing are: (1) whether the employer was communicating directly with union represented employees; (2) whether the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) whether such communication was made to the exclusion of the union. *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000) (citing to *Southern California Gas Co.*, 316 NLRB 979 (1995)).

There is no dispute that Respondent's supervisors communicated directly with Unit employees about the observance of the Independence Day holiday, and the Union was excluded from those communications. With respect to the second factor, I find those communications were for the purpose of changing terms and conditions of employment, namely the paid observance of the holiday. See *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006) (paid holidays are a mandatory subject

[30] Although Ortiz was a Union steward at the time, her authority was limited to ensuring employee safety. She was not involved in filing grievances, or on the Union's bargaining committee. (Tr. 266–267) (Jt. Exh. 9).

[31] Par. 9 of the second consolidated complaint. There is no allegation that moving the observance of the holiday from July 4 to 6 constituted a unilateral change. See *Champion International Corp.*, 339 NLRB 672, 673 (2003).

of bargaining). See also *E. I. du Pont & Co.*, 259 NLRB 1210, 1211 (1982) (same). Article 9 of the parties' agreement provides three scenarios regarding a recognized holiday: (1) the employees receive the day off with pay because they worked their scheduled work days before and after the holiday (or they fall within one of the listed exceptions); (2) the employees receive the day off without pay because they did not work their scheduled work day(s) before and/or after the holiday (or they do not fall within one of the listed exceptions); or (3) the employees are *required* to work on the holiday and they receive time and ½ and holiday pay or another day with pay at the company's discretion. The agreement gives Respondent the discretion to decide whether to require the employees to work the holiday, and, if so, the discretion to decide the alternative paid day off. But it does not allow Respondent to survey the employees about *the option* of working the holiday and having the holiday observed on another date. Those are the types of discussions Respondent is required to have with the employees' bargaining representative.

Additionally, even if these communications were not for the purpose of changing terms and conditions of employment, I find they were for the purpose of undercutting the Union's role in bargaining. At the time the supervisors surveyed employees about changing the Independence Day observance date, Respondent and the Union were meeting for contract negotiations. There were proposals to make minor changes to the language in Article 9, but they did not relate to surveying employees or giving them the choice about when they observe the holiday. Nonetheless, as discussed more fully below, Respondent was not engaged in good-faith bargaining with the Union, and it was engaged in other violative conduct. By bypassing the Union and talking directly to Unit employees about choosing their Independence Day holiday observance date, Respondent effectively offered the Unit employees a new benefit that was, as stated, a mandatory subject of bargaining. In so doing, I find Respondent was currying favor with the Unit employees to the exclusion of the Union while negotiations were ongoing, effectively undercutting the Union's role in bargaining.

For these reasons, I find Respondent bypassed the Union and dealt directly with employees by soliciting preferences about moving the observance of the holiday, in violation of Section 8(a)(5) and (1).

H. Subpoenas, Interrogations, and Use of Attorneys Retained and Compensated by Respondent

1. Factual Summary

In around October 2018, Region 14 of the Board issued subpoenas to Unit employees at the Hastings facility as part of its investigation into the unfair labor practice charges at issue. These subpoenas instructed the employees to appear and provide evidence in the form of an affidavit related to the allegations in these charges. A cover letter explained the topics that would be discussed. (GC Exh. 7).

One of the subpoenaed employees informed Respondent's administrative assistant Mary Junker that he had received the Board's letter and subpoena requiring him to appear before a Board agent on November 7, 2018. Junker asked the employee to bring her the documents for her to review, which the employee did. After reviewing the documents, Junker notified Respondent's CEO Ziegelheim and Respondent's attorney Jerry Pigsley. (Tr. 139–141).

On around October 31, 2018, Respondent retained an Omaha law firm (Kutak Rock LLP) to represent the employees in connection with the Board subpoenas. (R. Exh. 1). The engagement letter states the employees will be the firm's clients, and the attorney-client relationship will exist between the firm and the employees, not the firm and Respondent. Respondent agreed to pay all costs associated with that representation, and it agreed to provide the firm a $10,000 retainer.

In separate email correspondence, one of the Kutak Rock attorneys informed Ziegelheim that the attorneys wanted to meet with the employees who choose to be represented and suggested those meetings occur offsite because it would cause less disruption to Respondent's operations and may help facilitate candor in the attorneys' discussions with the employees. (R. Exh. 2). Ziegelheim ignored the suggestion and decided to have the attorneys meet the employees at Respondent's Hastings facility.

Respondent later posted a notice to employees, in English and Spanish, informing them that: they may be contacted to speak to a Board agent regarding charges the Union filed against the company, and that they had the right to have legal counsel, if they desired, prior to and when talking with the Board agents; the employees were not required to report to or consult with the company regarding obtaining counsel or talking with the Board agents; if the employees wished to speak to and/or be represented by legal counsel, they could contact one of the following attorneys (and the Kutak Rock attorneys' names and telephone numbers were listed); the company will pay for the attorneys as a benefit to its employees; and the company does not have an attorney-client relationship with these attorneys. (Jt. Exh. 15).

On around November 6, 2018, three Kutak Rock attorneys came to the Hastings facility to meet with the employees. Respondent assigned the attorneys (and their Spanish-speaking interpreters) to use the plant manager's office, the production superintendent's office, and a conference room. This area consisted solely of those managerial offices, the conference room, the bathrooms, and Mary Junker's desk.

In the first three hours the attorneys were there, Junker noticed that few employees were coming up to meet with them. She then contacted operations manager Paul Hernandez and gave him a list of employees who had resigned from the Union and told him to contact those employees to let them know that the company had provided attorneys for them for their meeting with the Board agents. Hernandez took the list, went and spoke with other supervisors who directly supervised the employees on the list, and told those supervisors to go and talk to the employees about the attorneys. (Tr. 151–153).

Hernandez also spoke to several employees. He spoke to employee Steve Lorreto Catalan (in Spanish) and told him "they" needed him in the office. Hernandez did not say who "they" were or why they needed him to go to the office. Hernandez only said, "You need to go to the office. They want to talk to you." (Tr. 440–441). As instructed, Catalan went to the office and he met with one of the attorneys.

Hernandez also spoke to Aramis Hernandez-Acosta (in Spanish) at his work station. Hernandez-Acosta was one of the employees who had received a Board subpoena. Hernandez told

Hernandez-Acosta he had to go to the office to talk to the "company attorney," and that he needed a company attorney to counsel him. (Tr. 365–366). Hernandez-Acosta responded, "No, I didn't have to go." Hernandez replied, "Yes, it is mandatory." Hernandez said that he didn't want Hernandez-Acosta to be confused or "to use a word that he didn't know how to use properly" when meeting with the Board agents. (Tr. 366). Hernandez then walked Hernandez-Acosta over to the area in the facility where the attorneys were located, and Hernandez-Acosta met with one of the attorneys for about 15 to 20 minutes.

The following day, Hernandez-Acosta met with the Board agents. Upon returning to work, his supervisor, José Madrigal, and Paul Hernandez approached him at his workstation and asked what "the feds" had asked him. Hernandez-Acosta replied, "a bunch of dumb stuff." Hernandez laughed and walked away. (Tr. 371–372). The next day Hernandez came back and again asked Hernandez-Acosta what the feds had asked him, and Hernandez-Acosta responded, "a bunch of stupid stuff." Hernandez again laughed and walked off. (Tr. 371–372).[32]

On around November 6, 2018, Madrigal called employee Juvencio Ramirez De la Cruz at home and asked if he had received a subpoena in a yellow envelope. De la Cruz replied that he had not. (Tr. 413). Madrigal told him that if he had not, he likely would get one soon, and the company had attorneys he could meet with if he wanted. Later that day, De la Cruz received a subpoena to meet with Board agents the following day. The next morning, he went to work and met with one of the Kutak Rock attorneys. The attorney he met with told him that she worked for the company and she was going to represent him (in the meeting with the Board agents). (Tr. 417–419).

In addition to showing the list of employees who had resigned from the Union to Hernandez, Mary Junker showed the list to superintendent Chris Kitch and she told him to speak to those employees in his department about the attorneys. Kitch testified he was told the employees "were to go to a meeting and we needed to make arrangements for them to be able to go." (Tr. 287). Kitch then informed supervisors who reported to him, including Josue Guerrero, Joel Murillo, and Karen Mendoza, to speak to the employees on their respective line(s) about meeting with the attorneys.

Josue Guerrero testified he went and individually asked each of the employees on his line (approximately 21–23 employees) whether they had received a letter about the Union. If they had, he told them the company had attorneys available if they wanted to go speak to them. (Tr. 162–169).

Joel Murillo spoke to several of his employees about whether they had received subpoenas (which he referred to as citations). (Tr. 507–508). He spoke to Marcial Torres-Santiago, who later told Murillo that he had received a letter (and subpoena). Later, while Torres-Santiago was working, Murillo told him there was "somebody" who needed to talk with him in the office. (Tr. 451). Murillo did not state who the "somebody" was or what they needed to talk to Santiago about. Torres-Santiago followed Murillo's instructions and went to the office, and he met with one of the attorneys.

Murillo also spoke with employees Alejandro Torres and Luz Esther Ledezma. Torres showed Murillo the subpoena he had received, and Murillo told him to go and talk with the attorney. Murillo did not say what Torres would be talking to the attorney about. Torres followed Murillo's instructions and spoke to one of the attorneys. (Tr. 507–509).

Ledezma also informed Murillo that she had received a subpoena. Murillo told her she had to go and talk to one of the attorneys. He did not explain why or what they would be talking about. Ledezma followed Murillo's instructions and went and spoke to one of the attorneys. (Tr. 520).[33]

2. Allegations and Analysis

a. Interrogation About Union and/or Board Activities

The General Counsel alleges that in early November 2018, Respondent, by Paul Hernandez, Joel Murillo, Jose Madrigal, Karen Mendoza, and Josue Guerrero, violated Section 8(a)(1) of the Act by interrogating employees about their Board activities and interrogating employees about their Union and/or Board activities without providing *Johnnie's Poultry* assurances.[34] Specifically, the General Counsel contends Respondent unlawfully questioned employees about receipt of correspondence, including subpoenas, concerning the Union and/or Board affidavits.

An employer is generally prohibited from interrogating employees regarding their Section 7 activities. However, in *Johnnie's Poultry Co*., 146 NLRB at 774–775, the Board crafted narrow exceptions to this prohibition, holding that an employer may interrogate employees where it is pertinent to either the verification of a union's claimed majority status to determine whether recognition should be extended, or the investigation of facts concerning issues raised in a complaint where such interrogation is

[32] A day or two later, Madrigal spoke to Hernandez-Acosta when he was picking up his paycheck. Madrigal asked Hernandez-Acosta about the Union. The record does not reflect what he specifically asked. Madrigal said the "Union was useless." Hernandez-Acosta replied the Union is the one who protects the civil rights of the workers. (Tr. 373). That was the end of the conversation.

[33] I credit Catalan, Hernandez-Acosta, De la Cruz, Torres-Santiago, Torres, and Ledezma. They offered candid, straightforward, and consistent testimony based on a strong recollection of the critical events at issue, and they were testifying against their interests by testifying against their employer. See *Flexsteel Industries*, 316 NLRB 745, 745 (1995) (current employee testimony contradicting statements of supervisors is "particularly reliable because those witnesses are testifying adversely to their pecuniary interests"), affd. mem. 83 F.3d 419 (5th Cir. 1996). In contrast, I do not credit Respondent's witnesses regarding these statements. They offered general, self-serving denials, which were undermined, in part, by Kitch's testimony that he understood the employees "were to go to a meeting and we needed to make arrangements for them to be able to go." This indicates the meetings were not optional, and he and the other members of management were instructed to ensure the employees meet with the attorneys. As for Madrigal, Respondent did not call him testify, leaving the credited testimony about his statements unrefuted.

[34] Subpar. 5(e) of the second consolidated complaint. At the hearing, the General Counsel specifically limited this subparagraph to the questioning by Respondent's supervisors and managers of employees, and not to any questioning by Kutak Rock attorneys of the employees. (Tr. 443–444).

necessary in preparing the employer's defense of the case. This latter exception has been extended to include employee interviews which occur while a charge is being investigated by the Board and before a complaint has issued. *WXGI, Inc*., 330 NLRB 695, 712 (2000), enfd. 243 F.3d 833 (4th Cir. 2001) (citing *Le Bus*, 324 NLRB 588 (1977)). In *Johnnie's Poultry*, the Board held:

> In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

146 NLRB at 775 (footnotes omitted).

Regardless of whether these safeguards are given, an employer is prohibited from questioning an employee about statements given during a Board investigation:

> In defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent. For such questions have a pronounced inhibitory effect upon the exercise by employees of their Section 7 rights, which includes protection in seeking vindication of those rights free from interference, restraint, and coercion by their employer. Moreover, interrogation concerning employee activities directed toward enforcement of Section 7 rights also interferes with the Board's processes in carrying out the statutory mandate to protect such rights.

Id. (footnote omitted).

Similarly, an employer is prohibited from questioning employees about whether they have received a Board subpoena. See *Frank Leta Honda,* 321 NLRB 482, 483, 490–491 (1996) (citing *Metalite Corp*., 308 NLRB 266, 272 (1992)).

I find Respondent, through supervisors Murillo and Madrigal, violated Section 8(a)(1) when they interrogated employees about whether they had received a Board subpoena. I make the same finding regarding Josue Guerrero's questioning of the employees on his line as to whether they had received a letter about the Union. The Board has generally held it is unlawful for an employer to question employees about whether they received correspondence from the union. See e.g., *Collins Mining Co.*, 177 NLRB 221, 225 (1969), enfd. 440 F.2d 1069 (6th Cir. 1971); *Montgomery Ward & Co., Inc*., 93 NLRB 640, 649 (1951), enfd. 192 F.2d 160 (2d Cir. 1951). In applying the *Rossmore House* "totality of circumstances" test, I find that a supervisor approaching subordinate employees at work, or calling them at home, for the sole purpose of asking whether they received a Board subpoena or letter about the Union would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and would interfere with the Board's processes in carrying out the statutory mandate to protect such rights.

I further find Respondent, through Hernandez and Madrigal, violated Section 8(a)(1) when they questioned Hernandez-Acosta about the contents of his meeting with "the feds." Questioning employees related to statements given during a Board investigation is "inherently coercive" and violates the Act. See *Acme Bus Corp*., 357 NLRB 902, 904 (2011); *Wire Products Mfg. Corp*., 326 NLRB 627-628 (1998), enfd. sub nom. 210 F.3d 375 (7th Cir. 2000). See also *U.S. Cosmetics Corp*., 368 NLRB No. 21, slip op. at 29 (2019). The same is true of questioning employees about their conversations with Board agents. *U.S. Cosmetics Corp.,* supra; *Contris Packing Co*., 268 NLRB 193 (1983)).[35]

The General Counsel argues Respondent violated Section 8(a)(1) when supervisors failed to provide *Johnnie's Poultry* assurances prior to questioning employees about receiving correspondence from the Board or about the Union and prior to advising them about meeting with the Kutak Rock attorneys. As stated, *Johnnie's Poultry* permits narrow interrogation for limited purposes and only if the employer provides the necessary assurances. According to Respondent, supervisors questioned employees to ensure that those who received subpoenas knew that the company was providing them with free legal representation prior to and during their meeting with Board agents. This is not one of the limited purposes for which *Johnnie's Poultry* permits narrow interrogation. As a result, regardless of whether the assurances were given—and there is no dispute they were not—the questioning was impermissible.

That being said, if the questioning at issue was found to be for a permissible purpose, it would have violated Section 8(a)(1) because the supervisors and managers involved failed to provide the necessary assurances prior to questioning the employees.

Based on the foregoing, I find Respondent, through its supervisors, violated Section 8(a)(1) by unlawfully interrogating its employees.

b. Use of Company-Provided Attorneys

The General Counsel also alleges that in November 2018, Respondent violated Section 8(a)(1) of the Act by requiring employees to meet with and/or use attorneys retained and compensated by Respondent prior to and during their meetings with Board agents, thereby interfering with the Board's processes.[36]

It is a violation of Section 8(a)(1) for an employer, in the context of a Board investigation, to offer to assist a nonsupervisory employee in obtaining legal representation, or to offer to provide

[35] The General Counsel presented no evidence regarding supervisor Karen Mendoza interrogating employees about their Board activities. As a result, I recommend dismissing this allegation.

[36] Par. 5(f) of the second consolidated complaint.

such legal representation at no cost to the employee. *KFMB Stations*, 349 NLRB 373 (2007); *S.E. Nichols, Inc*., 284 NLRB 556, 580–582 (1987), enfd. in relevant part 862 F.2d 952 (2d Cir. 1988), cert. denied 490 U.S. 1108 (1989); *Florida Steel Corp*., 233 NLRB 491, 494 (1977), enf. denied 587 F.2d 735 (5th Cir. 1979).

In *Florida Steel*, supra, the employer distributed a letter during an unfair labor practice investigation advising employees that they had a right to consult with counsel before talking to the Board agents and the company would assist employees in obtaining counsel for those who so desired. The Board adopted the judge's finding that the employer's offer was "a patent attempt to obstruct the investigations of the Board by discouraging employees from supplying information to Board agents." 233 NLRB at 494.

In *S. E. Nichols*, supra, the employer's agent informed employees that Board agents would be visiting the facility and might want to interview them. He told the employees that "if [they] needed any protection he would get his lawyer to sit in on the meeting." The employer's agent also told the employees they could see the company attorney if they needed help in connection with the Board agents asking them to provide statements. The Board held:

> Essentially, telling employees that they might need protection in an action against the Respondent would tend to dissuade them from cooperating with the Board. Secondly, here the Respondent did not recommend obtaining independent counsel but offered only its own attorney, thus, in the judge's words, "temptingly proposing a serious conflict of interests."

284 NLRB at 559 fn. 9.

In *KFMB Stations*, supra, the employer offered an employee who had received a Board subpoena the services of its attorney. In that case, a supervisor told the employee to come to work early one day and meet with the company attorney. The employee met with the attorney in the employer's conference room, and the attorney stated he was representing others who had received subpoenas, and the employer was making him available to the employee if he wanted representation during the Board's investigation. The attorney also asked the employee why he thought he had been subpoenaed. The Board found these statements unlawful.

Here, Respondent did more than *offer* to provide employees with free legal representation while meeting with Board agents--it *required* employees to meet with and use the attorneys.[37] Hernandez-Acosta, Torres-Santiago, Torres and Ledezma each credibly confirmed this.[38]

I find Respondent violated Section 8(a)(1) by requiring employees to meet with and/or use attorneys retained and compensated by Respondent prior to and during their meetings with Board agents, thereby interfering with the Board's processes.

c. Hernandez' Statements

The General Counsel also alleges that on about November 6, 2018, Respondent, by Paul Hernandez, violated Section 8(a)(1) of the Act when he told employees that they were required to use Respondent's paid attorneys when meeting with the Board's agents, in part, because Respondent did not want employees speaking to the Board agents about matters they should not be talking about.[39] These allegations relate to Hernandez' statements to Hernandez-Acosta in which he told Hernandez-Acosta he was required—or that it was mandatory—to go to the office to talk to the "company attorney," and that he needed a company attorney to counsel him when he met with the Board agents so that he would not be confused or use a word that he didn't know how to use properly. Hernandez then went so far as to escort Hernandez-Acosta over to the area where the attorneys were located to ensure he met with one of the attorneys prior to going and meeting with the Board agents to give his affidavit.

An employer who advises an employee what to say or not say to a Board agent violates Section 8(a)(1) of the Act because it creates "a serious impediment to the Board's processes [and] has a natural tendency to inhibit an employee in resorting to or cooperating with the Board in the protection or clarification of [Section 7] rights." See *A&P Import Co.*, 154 NLRB 938, 945 (1965). See also *Certain-Teed Products Corp.*, 147 NLRB 1517 (1964). Although Hernandez did not specifically tell Hernandez-Acosta what to say or not say when meeting with the Board agent, he told Hernandez-Acosta that he needed the company attorney so he would not get confused or say something wrong when meeting with the Board agent. I find that telling employees they cannot be trusted to speak to a Board agent without a company-provided attorney would reasonably inhibit employees from resorting to the Board for the protection of their Section 7 rights, and that Hernandez' statements to Hernandez-Acosta violated Section 8(a)(1).

I. Bargaining Over Successor Collective-Bargaining

[37] In its posthearing brief, Respondent relies on the Fifth Circuit's decision denying enforcement of the Board's order in *Florida Steel*. The Court of Appeals held the letter at issue neither required nor compelled any employees to report to or consult with the company regarding the obtaining of counsel, made it clear that any action employees took with respect to obtaining counsel or talking to a Board agent was entirely optional with them, and offered assistance without regard to the positions employees took with respect to the union or talking with the Board agent. *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 752–753 (5th Cir. 1979). As stated, this case is distinguishable because Respondent *required* that employees meet with the attorneys prior to and/or while meeting with the Board agents.

[38] Respondent argues that, unlike in *S.E Nichols* or *KRMB Stations*, it provided employees with independent legal representation, as opposed to a company attorney. I reject this argument. When Paul Hernandez met with Aramis Hernandez-Acosta, he referred to the Kutak Rock attorneys as "company attorneys." When Juvencio Ramirez de la Cruz met with one of the Kutak Rock attorneys, she informed him she "worked for the company" and was going to represent him. Additionally, the Kutak Rock attorneys met with the employees at Respondent's facility, in the area where the managers and administrative staff are located, and in the offices of the plant manager and the production superintendent. These factors reasonably would create the impression among employees that the Kutak Rock attorneys were working for or affiliated with Respondent.

[39] Subpar. 5(g) of the second consolidated complaint.

Agreement, Declaration of Impasse, and Implementation of Last, Best, and Final Offer

1. Factual Summary

On November 6, 2017, the Union sent Respondent a letter requesting dates for the parties to meet to commence negotiations over a successor agreement. As previously discussed, the Union included a request for information about the Unit employees to use for those negotiations. The Union received no response to that request, or its subsequent requests in December 2017 and January 2018. Finally, on January 17, 2018, Respondent's attorney Jerry Pigsley notified Union's attorney Eric Zarate that the Union should pick dates it was available for bargaining. On January 24, 2018, Zarate emailed Pigsley, stating that assuming the Union received the requested information "in the near future," the Union tentatively planned to begin negotiations on February 20, 2018. Pigsley did not respond. On February 12, 2018, Zarate sent Pigsley a letter noting the Union's disappointment with Respondent's failure to respond. On February 19, 2018, Pigsley emailed Zarate, proposing 10 partial days (March 14, 16, 19, 21, 22, 23, and 26) and 1 full day (March 30) that Respondent was available for bargaining, and he asked Zarate to let him know what *date* worked best to commence negotiations. Pigsley also stated Respondent "will seek to provide the requested information [within] the next 30 days." (Jt. Exh. 3, p. 8). On February 21, Zarate emailed Pigsley seeking confirmation that Respondent was available for negotiations on all the dates Pigsley listed in his February 19 email. Pigsely responded his client was not and suggested the Union pick one date that works best for it. He added that, "Hopefully, by the chosen date I will have some of the information your client has requested." (Jt. Exh. 3, p. 15). On February 22, Zarate emailed Pigsley stating that while he understood Respondent may not be able to meet on each of the proposed dates, the Union preferred more than one scheduled session because, as in the past, negotiations would require multiple sessions. Zarate proposed having the parties meet briefly on March 22 to exchange proposals and then meet again on March 26-28 for actual negotiations. On February 28, Pigsley emailed Zarate back, stating that he had not heard back from his client. As of March 6, 2018, Pigsley had not responded about meeting on March 22, and Zarate sent an email asking for an update. Zarate asked if the parties could, at a minimum, meet on March 22 to exchange proposals, and whether Respondent could provide the Union with any portion of the requested information prior to March 21, noting that four months had passed since the Union's initial request. Pigsley responded to Zarate, agreeing to meet on March 22. Pigsley also stated he had no update on any other proposed dates or the production of the requested information, but he stated he would seek to have some of the information provided ahead of the March 22 session. (Jt. Exh. 3, p. 13).

The parties met on March 22, 2018, at the Union hall in Grand Island, Nebraska.[40] The Union's multi-person negotiating team was led by Union president Mike Marty. Pigsley attended alone for Respondent. At this session, the Union provided Respondent with its initial contract proposal. (Jt. Exh. 4). The Union's proposal was 13 pages and sought various changes to the existing agreement. The Union's proposals did not include economics because, in part, it needed the requested information to formulate its proposals on those topics. (Tr. 663-664). After the Union explained its proposal, Pigsley asked clarifying questions, which Marty answered. (Tr. 661).

Although the plan was for the parties to exchange initial proposals, Respondent did not submit a proposal. Respondent also did not provide the Union with any of the information it had requested. Marty asked Pigsley about the information, and Pigsley replied the company was working on it. (Tr. 663). Marty then asked Pigsley about future bargaining dates. Pigsley offered April 25, which was the same date as the arbitration of the Union's grievance over Respondent's decision to bar Union representatives from accessing the Hastings facility. Marty reminded Pigsley of the conflict and stated he could not see how that date would work. Pigsley did not offer any other dates. (Tr. 662).

On March 28, Zarate and Pigsley spoke on the telephone and Zarate then sent an email memorializing their conversation. In that email, Zarate stated the Union was requesting another negotiation session and was proposing any time prior to April 22, and that Pigsley had agreed to check with his client concerning its availability and get back to Zarate. Zarate also stated Pigsley agreed to check on the status of the Union's information request. Zarate concluded the email by stating the Union was prepared to file an unfair labor practice charge if Respondent failed to provide the requested information or schedule additional negotiation dates by the end of the day. Later that day, Pigsely emailed Zarate stating Respondent was available to meet with the Union for negotiations on April 25, and, if that date did not work, May 9. Pigsley also stated Respondent was gathering the requested information, but he had not received it yet for transmittal to the Union. (Jt. Exh. 3, pp. 17-18). On March 29, the Union filed its initial unfair labor practice charge in Case 14–CA–217400, alleging Respondent failed and refused to bargain in good faith with the Union and failed to furnish the Union with requested information.

The parties scheduled their second bargaining session for May 9, 2018. On May 8, Pigsley emailed Zarate stating his client needed to postpone that session because Ziegelheim would not be back in town in time for the negotiations. Pigsley proposed meeting on May 15. The Union reluctantly agreed, and Zarate emailed Pigsley about a 10:30 a.m. start time. Pigsley did not respond about the start time until May 14. (Jt. Exh. 3, pp. 19–21).

The parties met for negotiations on May 15, 2018. Pigsley was Respondent's sole representative at this session. Once again, Respondent failed to provide the Union with any of the information it had requested for the last seven months. At this meeting, Pigsley provided the Union with Respondent's initial contract proposal. (Jt. Exh. 5). Respondent's proposal sought to change the following provisions under the parties' expired agreement: (1) modify Article 1 (Recognition) to remove maintenance employees from the Unit; (2) completely eliminate Article 2 (Maintenance of Membership—Dues Checkoff); (3) modify Article 4

[40] All negotiation sessions occurred at the Union hall in Grand Island, Nebraska.

(Grievance Procedure) to eliminate steps 3 and 4 in the grievance procedure;[41] (4) modify Article 7 (Safety) to eliminate the safety committee monthly inspection;[42] (5) modify Article 9 (Holidays) to state that if a holiday falls on a Saturday or Sunday, the prior Friday or following Monday shall not be observed as the holiday; (6) modify Article 12 (Rates of Pay Provision) to provide for $.15/hour increases after every six months, and that the starting wage rates be $9.00/hour for Group 1 and $9.50/hour for Group 2 (there was no proposal regarding any of the other groups or classifications); (7) completely eliminate Article 21 (Plant Visitation) relating to access by Union representatives;[43] and (8) modify Article 24 (Term of Agreement) to be left open for negotiation. The record does not reflect whether Pigsley provided the Union with Respondent's rationale for these changes, and the record does not reflect what, if any, questions the Union asked about the proposed changes. Pigsley informed the Union he still had no response to the Union's March 22 proposal. The session ended without scheduling any future bargaining sessions.

On June 20, 2018, the Region approved the parties' bilateral informal settlement in Case 14–CA–217400, which required Respondent to: (1) provide the Union with the information it had been requesting since November 6, 2017; and (2) commit to a bargaining schedule of no less than 24 hours per month for at least six hours per session, or in the alternative, on another schedule to which the Union agreed. The settlement also required Respondent to bargain in good faith with the Union over wages, hours, and other terms and conditions of employment until a full agreement or bona fide impasse was reached. (Jt. Exh. 11).

On June 26, Zarate renewed the Unions' request for bargaining, stating the Union was available to meet throughout July and August. He identified nine days in July and August that the Union was unavailable for bargaining. (Jt. Exh. 3, pp. 27-28). On July 5, Pigsley emailed Zarate that Respondent was available for negotiations on July 13, 20, 30, and 31, from 10 a.m. to 4 p.m. (Jt. Exh. 3, p. 25). Zarate responded the Union was available on July 13, 30, and 31, and he proposed July 17 or 27 as an alternative for July 20. He also reminded Pigsley about the requested information. (Jt. Exh. 3, pp. 24–25). Pigsley agreed to meet on July 13, 27, 30, and 31.

The parties met as scheduled for negotiations on July 13, 2018. However, Respondent's administrative assistant Mary Junker replaced Pigsley as Respondent's sole bargaining representative. Before negotiations began, Junker told the Union representatives, "I don't know why I am here. I do not know why they sent me. I can't make any decisions." (Tr. 668). She later advised the Union she would have to bring any proposal back to Ziegelheim and Koenig, as they were the only two with authority to accept, reject, or counter a proposal. (Tr. 66–67). Marty then went through the Union's responses to Respondent's May 15 proposal. Junker told the Union she would need to get back to them regarding the Union's March 22 proposal, because she still had not received any answers from Ziegelheim and Koenig.

As stated, on July 13, Pigsley provided the Union with partial information in response to its November 6, 2017 information request. The response included information for approximately 15 of the approximately 250-300 Unit employees. (Jt. Exh. 19). On July 16, Zarate emailed Pigsley explaining how the response was substantially deficient and demonstrated a lack of good faith concerning Respondent's compliance with the parties' informal Board settlement. (Jt. Exh. 20).

On July 16, Zarate notified Respondent the Union was no longer available to meet on July 30 and 31 because of a last-minute scheduling conflict. Zarate confirmed the Union still planned to meet for negotiations on July 27. He also requested dates Respondent was available for bargaining in August, noting the Union was unavailable August 6–10, and 16. (Jt. Exh. 3, p. 24).

The parties met for negotiations on July 27, 2018. Marty again led the Union's multi-person bargaining committee. At this session, Mary Junker was accompanied by Respondent's operations manager, Paul Hernandez. According to Junker, Respondent sent Hernandez because the Union had complained the company was not bargaining in good faith by just sending her. Hernandez' role was simply to observe. At this session, Junker told the Union that Respondent denied all of the Union's March 22 proposal, without offering any explanation or counterproposal. (Tr. 74). The Union then caucused and prepared a modified proposal. (Tr. 671–673). The parties reconvened and the Union provided Junker and Hernandez with the modified proposal. (Jt. Exh. 6). The Union made several revisions to its initial proposal, including proposing to withdraw certain items in exchange for Respondent withdrawing certain of its proposals. Junker had no authority to respond to the Union's proposal on her own, so she attempted to call Ziegelheim and Koenig. Ziegelheim was traveling at the time, and he told Junker to bring the proposals back with her, and they would discuss them when

[41] Art. 4 sets forth a multi-step grievance procedure. The first step is for the employee and a union steward to meet with the employee's immediate supervisor within 5 days of knowledge of the incident at issue. If the matter is not resolved, the second step is for the steward or other designated union representative to submit a written grievance within 5 days of receipt of the employer's answer at the first step and present that to the plant manager. The parties will meet and the plant manager or his designee shall issue an answer to the grievance, in writing, within 5 days. If the matter remains unresolved, the third step is for the Union grievance committee to submit a written grievance within 5 days of the employer's answer at the second step to the designated human resource representative. The parties meet over the grievance and the human resource representative will issue a written answer within 5 days. If the matter remains unresolved, the fourth step is for the Union's business agent or designated representative to submit a written grievance within 5 days of the employer's answer at the third step to the designated human resourced representative, and that representative will issue a written answer within 5 days. The final step is to submit the grievance to arbitration for a final and binding decision. (Jt. Exh. 1, p. 4).

[42] Article 7 establishes a safety inspection committee (the Union business agent and one Unit employee) that visually inspects the facility for safety issues on a monthly basis. The inspection is not to exceed 2 hours. (Jt. Exh. 1, p. 5).

[43] Article 21 allows the Union the opportunity to meet with new employees during orientation to discuss the Union's role and solicit signatures on membership application and dues authorization forms. It also affords the Union the right to visit the plant to investigate grievances or to review operations. (Jt. Exh. 1, p. 11).

he returned. (Tr. 78–79). That was the end of the meeting.[44]

On August 10, Zarate emailed Pigsley again requesting bargaining dates in August, and the remaining information in response to the Union's requests. Zarate referred to his earlier correspondence (which he attached) explaining how Respondent's July 13 production in response to the Union's information request was substantially deficient. (Jt. Exh. 3, p. 23). Later that day, Pigsley replied that Respondent was available for bargaining on August 17, 23, 28, and 30, from 10 a.m. to 4 p.m. Pigsley said nothing about the information request. On August 13, Zarate emailed Pigsley that the Union was available each of those dates. He also asked whether Respondent would be providing any additional information responsive to the Union's request. (Jt. Exh. 3, p. 23). Pigsley did not respond.

The parties met for negotiations on August 17, 2018. Marty again led the Union's multiperson bargaining committee. Junker was Respondent's sole representative. She explained that Respondent had accepted four items from the Union's March 22 proposal. Specifically, Respondent accepted proposals 2, 3, 18, and 19. (Tr. 79–80; 681–682) (Jt. Exh. 4, p. 3). Proposals 2 and 3 relate to Articles 3 (management rights) and 17 (seniority) of the parties' agreement. Article 3 states, "Employees must pass probation to enjoy benefits." (Jt. Exh. 1, p. 3). Article 17 defines the probationary period as 60 days. The Union proposed moving the above language from Article 3 to Article 17 and adding the word "health" in front of "benefits" to clarify those were the benefits at issue. (Tr. 80; 682–683). Union proposals 18 and 19 both involved revising the language in Article 15 (non-discrimination). (Jt. Exh. 1 p. 15) (Jt. Exh. 4, p. 7). Proposal 18 sought to delete the current language and proposal 19 sought to replace the old language with an updated version that included additional protected classes. (Tr. 80; 681–682) (Jt. Exh. 4, p. 7). Junker had no response to the Union's July 27 counterproposal because she had not been able to discuss it with Ziegelheim and Koenig. (Tr. 673–674).

The parties next met for negotiations on August 22, 2018. Junker again appeared as Respondent's sole representative. She informed the Union she still had no response to the Union's July 27 proposal because Ziegelheim and Koenig were unavailable. (Tr. 673–674).

The parties were next scheduled to meet for negotiations on August 28. The day before, Pigsley emailed Zarate cancelling the session, stating Respondent's "negotiating team" was unavailable. Zarate emailed back asking for Respondent's availability in September and inquired if Respondent would be available for 5 sessions rather than 4 to make up for cancelling the August 28 session. (Jt. Exh. 3, p. 29). Pigsley did not respond.

The parties next met for negotiations on August 30, 2018. At this session, Junker informed the Union that Respondent rejected its July 27 counterproposal. She offered no explanation for the rejection, and she made no counterproposal. That was the end of the bargaining session. (Tr. 81–82; 675).

The parties next met on September 12, 2018. At this session, the Union made another counterproposal to Respondent, in which it offered to withdraw two of its proposals in exchange for Respondent withdrawing two of its proposals. (Jt. Exh. 6, p. 3). Again, Junker told the Union representatives that she needed to show the counterproposal to Ziegelheim and Koenig, but she did not attempt to contact either at the time. That effectively ended of the session.

The parties were scheduled to meet for negotiations on September 14, 2018, but that meeting did not occur. Later that day, Pigsley emailed Zarate stating Respondent needed to cancel their scheduled session on September 19 because Ziegelheim and Koenig were unavailable because of the Jewish holidays they observe. Pigsley added that it was his understanding the Union had cancelled the negotiations that day (September 14) and their scheduled negotiations for September 28. On September 17, 2018, Zarate emailed Pigsley disputing his claims that the Union cancelled the September 14 or 28 sessions. Zarate's stated that prior to the September 14 session, Junker told the Union that Ziegelheim and Koenig were out of the country and unavailable to respond to matters affecting negotiations. He also stated the parties had no negotiations scheduled for September 28. Zarate questioned the cancellation of the September 19 session, noting that neither Ziegelheim nor Koenig had been present at any prior negotiation session. Zarate added that the cancellation of the session only confirmed the Union's claims that Junker lacked any real authority to negotiate with the Union. He concluded by requesting Respondent's availability for negotiations for the remainder of September and October. (Jt. Exh. 3, p. 30). Almost three weeks later, on October 5, Pigsley responded to Zarate's email, stating the company was available for negotiations on October 11, 18, 25, and 31, from 10 a.m. to 4 p.m. That same day, Zarate responded confirming those dates. (Jt. Exh. 3, p. 32).

The parties next met for negotiations on October 11, 2018. At this session, Junker informed the Union that Respondent rejected the Union's September 12 counterproposal. (Tr. 84). She provided no explanation for the rejection, and she offered no counterproposal. (Tr. 85; 674–678).

The parties met for bargaining on October 18 and 31, November 13, and December 7 and 19, 2018. At each of these sessions the Union prepared a modified counterproposal which it presented to Junker. Consistent with the Union's earlier counterproposals, it offered to withdraw certain items from its initial proposal in exchange for Respondent withdrawing items from its initial proposal. Each time, Junker informed the Union she would need to take the proposal back to the company's principles for them to review and that she would report back with an answer. Each time she reported back with the same answer—proposal rejected. She rejected each of the Union's proposals and counterproposals without any explanation, and without offering any counterproposals. (Tr. 86; 674–678).

On January 2, 2019, the parties met again. At this session, Junker presented the Union with what she termed was Respondent's last, best, and final contract proposal. (Jt. Exh. 7). The proposal was identical to Respondent's May 15 initial proposal, except there was no reference at all to Article 12 or wages generally,

[44] As of this meeting, the only agreement the parties reached was over changing the corporate name from Nebraska Prime Group to Noah's Ark Processors, LLC d/b/a WR Reserve. (Tr. 74) (Jt. Exh. 25).

and the term of the agreement was set for one year (January 1, 2019, to December 31, 2019). Junker did not provide any additional information about Respondent's last, best, and final proposal, and she did not provide a deadline for the Union's response to the proposal. Marty informed Junker that the Union would need an opportunity to review the proposal.[45]

Thereafter, Marty contacted Junker and requested a meeting to go over certain questions he had regarding the Respondent's last, best, and final offer. Marty and Junker met on January 25, 2019. At this meeting, Marty informed Junker that the company's proposal did not include the tentative agreements the parties reached on August 17. Junker responded that those were included in Respondent's offer; they just were not addressed in writing. Marty also informed Junker that the company's proposal did not address wages. Junker responded, "Well, we already did wage increases." (Tr. 685–686). Marty also asked Junker about the term of the agreement, stating the parties had never discussed that or addressed it in their proposals. Junker had no response. (Tr. 686-687). The meeting ended. Junker provided no deadline for the Union to respond to Respondent's last, best, and final proposal. She also did not mention impasse or provide a timeline for implementation of that proposal. Marty did not request any further meetings and gave no indication about the Union's next course of action. (Tr. 709–710).

As previously stated, when Respondent denied Union agents access to the Hastings facility starting late June 2017, the Union filed a grievance that eventually went to arbitration. The Union prevailed. Respondent, however, continued to deny the Union access. The Union then sought enforcement of the arbitration decision in federal district court. On January 28, 2019, the federal district court issued an order enforcing the arbitration award. On January 30, 2019, the Union sent two agents to the Hastings facility. Respondent denied them access. (Tr. 690–693).

That same day, Pigsley emailed Zarate stating the company had presented the Union with its last, best, and final proposal on January 2, 2019, which the Union did not accept. He went on to state the parties met on January 25, 2019, at the Union's request, during which the Union again did not accept the company's proposal. Based on these factors, Pigsley declared the parties were at an impasse and Respondent was implementing its last, best, and final proposal. (Jt. Exh. 8).

As of January 30, 2019, Respondent implemented its last, best, and final offer, in its entirety, including unilaterally removing the maintenance employees from the Unit, eliminating the maintenance of membership—dues checkoff provision, striking steps 3 and 4 of the grievance procedure, confirming the how weekend holidays would be observed, removing the monthly safety committee inspection, confirming the new wage rates/system (which already had been unilaterally implemented in August 2018), eliminating the provision allowing Union representatives to visit the plant, and setting the term of the agreement for one year. The Union, through its counsel, emailed Respondent seeking rescission of its implemented last, best, and final offer. Respondent refused to rescind. (Tr. 713–714).

2. Allegations and Analysis

a. Overall Bad-Faith Bargaining

The General Counsel alleges that from March 2018, and continuing, Respondent, by its overall conduct, violated Section 8(a)(5) and (1) of the Act when it failed or refused to bargain in good faith with the Union over a successor agreement.[46]

Section 8 (d) of the Act imposes "a mutual obligation on the [parties] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession…" That being said, the obligation or duty to bargain in good faith requires more than just going through the motions; it requires that parties approach bargaining with a "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Truitt Mfg*, 351 U.S. at 155. See also *Endo Laboratories, Inc*., 239 NLRB 1074, 1075 (1978) (recognizing the "the kind of 'horsetrading' or 'give-and-take' that characterizes good-faith bargaining"). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co*., 344 F.2d 210 (8th Cir. 1965)). See also *Regency Service Carts*, 345 NLRB 671 (2005); *Public Service*

[45] At each of the bargaining sessions the parties had a sign-in/sign-out sheet reflecting who attended the session. (Jt. Exh. 9). Some of the sheets reflect when the session ended, and if the parties agreed to end their session early. The sessions typically began at around 10 a.m. and *lasted an hour or less*. (Tr. 676). Marty testified that during these sessions most of that time was spent in casual conversation because Junker was unable to respond to the Union without first speaking to Ziegelheim or Koenig, which she frequently was unable to do. (Tr. 676–678).

[46] Paragraph 11 of the second consolidated complaint. Subparagraph 11(b) specifically alleges Respondent demonstrated an overall lack of good faith when it: (1) failed to provide the Union with presumptively relevant information requested since November 6, 2017 (referring to subparagraph 8(a) of the second consolidated complaint); (2) failed to cloak its bargaining representatives with the authority to enter into binding agreements; (3) cancelled bargaining sessions at the last moment without explanation; (4) failed to make bargaining proposals; (5) failed to provide explanations for rejection of the Union's bargaining counterproposals; (6) denigrated the Union in the eyes of Unit employees by statements made at a safety meeting in March 2018, by soliciting employees to resign from the Union and cease paying union dues in June and July 2018, by providing pre-printed forms to resign from the Union and revoke their dues checkoff authorizations from January through July 2018, by interrogating employees about their support for the Union in June and July 2018, and by coercing employees into signing pre-printed non-disclosure of confidential employment information forms (referring to subpars. 5(a), 5(c)(1), 5(c)(2), 5(c)(3), and 5(c)(4) of the second consolidated complaint); (7) directly dealt with employees about mandatory terms of conditions of employment (referring to paragraph 9 of the second consolidated complaint); (8) unilaterally changed employees' terms and conditions of employment, including wages and dues-checkoff revocations, without notice and bargaining with the Union and changed the terms of the collective-bargaining agreement without the Union's consent (referring to paragraph 10 of the second consolidated complaint); and (9) implemented its last best and final offer on January 30, 2019, before reaching a valid impasse (referring to paragraph 13 of the second consolidated complaint). (GC Exhs. 17 and 18). Allegations 1, 6, 7, 8, 9, are addressed above.

Co. of Oklahoma, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

In determining whether an employer has violated its statutory duty to bargain in good faith, the Board examines the employer's overall conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma*, supra at 487; *Mid-Continent Concrete*, supra at 260-261. The Board considers several factors, including unreasonable bargaining demands, failure to provide relevant information, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union and deal directly with the employees, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrarily scheduling/cancelling bargaining sessions. *Mid-Continent Concrete*, supra at 259–260; *Hartz Mountain Corp.*, 295 NLRB 418, 426 (1989); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). A party is not required to engage in each of these activities to be found to have violated the Act. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Rather, the Board looks at the party's overall conduct to determine if it demonstrates a sincere intent to reach agreement. Id. at 130 fn. 2.

As previously discussed, I find Respondent failed to bargain in good faith with the Union away from the table by repeatedly failing or refusing to provide the Union with presumptively relevant information that was requested for the purpose of bargaining a successor agreement, unilaterally implementing changes to contractual wage rates and the dues-checkoff procedures without the Union's consent and without providing the Union with notice or an opportunity to bargain, and bypassing the Union and dealing directly with Unit employees regarding the observance of the Independence Day holiday. Respondent also coerced employees into signing the pre-printed non-disclosure forms which included the same type of information that the Union had been requesting in order to negotiate a successor agreement.

Respondent's conduct at the table was no better. First, it failed to designate a negotiator who had any real authority. The duty to bargain requires that a party designate a negotiator with real authority to carry on meaningful bargaining regarding fundamental issues. *Wycoff Steel*, 303 NLRB 517, 525 (1991). The negotiator need not have final authority to enter into an agreement, but the negotiator cannot be so limited in power and knowledge that it hinders the progress of negotiations. Id. Consequently, the degree of authority, or lack thereof, conferred on the negotiator is a factor considered in determining whether the party bargained in good faith. Id. (citing *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954)).

There is no dispute that Junker lacked the authority to independently make, reject, or agree to *any* proposal. She was little more than a conduit of information between Ziegelheim and Koenig and the Union's negotiating committee. Yet, even in that role Junker was limited. She was either unable or unwilling to contact Ziegelheim or Koenig when the parties met for negotiations to get the necessary information or responses to move negotiations along. Junker's lack of authority and knowledge meant the bargaining sessions were short, usually lasting less than an hour, and unproductive, with most of the time spent in casual conversation and little-to-no discussion on the issues.

Second, Respondent delayed to scheduling bargaining sessions or selected dates for which there was a known conflict. The Board has held dilatory tactics, such as delaying the scheduling, limiting, or cancelling of bargaining sessions, is evidence of bad faith. See e.g., *Regency Service Carts, Inc.*, supra at 673; *Mid-Continent Concrete*, supra at 260-261; and *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995). As outlined, the Union sent its reopener letter on November 6, 2017. Respondent did not agree to meet with the Union until March 22, 2018. At the end of that March 22 session, Respondent offered a single date for the parties' next bargaining session—the date of the arbitration over the Union's access grievance. When advised of the conflict, Respondent refused to provide any alternate dates prior to the date of the arbitration. Thereafter, there were numerous instances outlined above in which Respondent delayed in responding to the Union's efforts at scheduling future bargaining, at times waiting weeks to confirm its availability.

Respondent also cancelled multiple bargaining sessions (May 9, August 28, September 14, and September 19), often on short notice, because Ziegelheim or Koenig were unavailable. But Ziegelheim and Koenig were never present for negotiations. Junker was Respondent's sole bargaining representative from June 2018 forward, and there were bargaining sessions when she could not or did not get in contact with Ziegelheim and Koenig. Respondent failed to explain why, on these four dates, the unavailability of Ziegelheim and Koenig required the sudden cancellation of scheduled bargaining sessions.

Third, Respondent failed to submit counterproposals and provide explanations for its rejection of the Union's counterproposals. The lack of exchange of proposals or counterproposals is a factor the Board considers in determining whether a party is bargaining in good faith. See generally *Mid-Continent Concrete*, supra at 260; *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996), enfd. 140 F.3d 169 (2nd Cir. 1998); and *MRA Associates, Inc.*, 245 NLRB 676, 677 (1979). Respondent made two proposals--its initial May 15 proposal and its January 2 last, best, and final proposal--which are virtually identical. The Union submitted 8 proposals or counterproposals. The Union made multiple offers to withdraw or modify its proposals in exchange for Respondent doing the same. However, Respondent summarily rejected those proposals, without explanation. It never offered to modify or eliminate any of its own proposals to reach a compromise. A party demonstrates an overall lack of good faith when, as here, it does not budge from its initial bargaining position(s), fails to explain its positions, and refuses to make any effort to compromise to reach common ground on key issues. *Altofer Machinery Co.*, supra at 150; *John Asuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992). See also *Mid-Continent Concrete*, supra.

Based on these factors, as well as the factors discussed below regarding the declaration of impasse and implementation of the last, best, and final offer, I find Respondent violated Section 8(a)(5) and (1) when it failed or refused to bargain in good faith

with the Union over a successor agreement.[47]

b. Declaration of Impasse and Implementation of Last, Best, and Final Offer

The General Counsel further alleges that on January 30, 2019, Respondent violated Section 8(a)(5) and (1) of the Act when it declared impasse and implemented its last, best, and final collective-bargaining proposal, unilaterally changing mandatory subjects of bargaining, including articles addressing dues checkoff, grievance procedures, safety, holidays, union access, and the term of the agreement, without first bargaining with the Union to an overall good-faith impasse for a successor agreement. Additionally, it separately violated Section 8(a)(5) and (1) when it insisted to impasse and implemented a change to the scope of the Unit, which is a permissive subject of bargaining.[48]

The Board has held a bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement and the parties are deadlocked. *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), review denied sub. nom. 392 F.2d 622 (D.C. Cir. 1968). To determine whether a good-faith impasse has been reached, the Board considers the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Stein Industries, Inc*., 365 NLRB No. 31, slip op. at 3 (2017) (quoting *Taft Broadcasting Co*., supra). Impasse is that point in time in negotiations where the "parties have discussed the subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974). The parties must both "believe they are at the end of their rope." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (2016) (quoting *Larsdale, Inc*., 310 NLRB 1317, 1318 (1993)). The party claiming impasse bears the burden of demonstrating its existence. *Dish Network Corp*., 366 NLRB No. 119, slip op. at 2 (2018); *Grosvenor Orlando Associates, Ltd*., 336 NLRB 613, 616 (2001). For the reasons stated below, I find Respondent failed to meet its burden of proving the parties were at good-faith impasse.

Respondent contends the parties met for negotiations approximately 20 times over 7.5 months, and while they were able to reach minor tentative agreements—changing the employer's legal name, updating the anti-discrimination language, and moving existing language about benefit eligibility from one article to another—they were unable to come to an agreement on any of the important issues. Additionally, Respondent contends after it gave the Union its last, best, and final offer, the Union failed to accept, reject, or present any counter, and, therefore, as of January 30, 2019, the parties had a contemporaneous understanding about the state of negotiations, which was they were both "at the end of their rope." (R. Br. 26). I reject these contentions.

Although the parties met multiple times over several months, as stated, little of that time was spent in actual negotiations. See *Fallbrook Hospital*, 360 NLRB 644, 651 (2014) (citing to *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952) (quantity or length of bargaining sessions does not necessarily equate with good-faith bargaining; must look at the substance and approach of the parties); *Insulating Fabricators*, 144 NLRB 1325 (1963), enfd. 338 F.2d 1002 (4th Cir. 1964). Respondent held firm to its initial May 15 proposal and summarily rejected each of the Union's counterproposals, without explanation. *88 Transit Lines*, 300 NLRB 177, 178 (1990) ("major function of the bargaining process is reaching common ground *that represents modifications of language contained in parties' initial proposals*.") (emphasis added).

Respondent claims the parties were at impasse because they could not come to agreement on any of the "important" issues. Respondent, however, fails to identify what those "important"

[47] Respondent's proposals sought to eliminate dues-checkoff, terminate the monthly safety committee inspection requirement (which allowed the Union representative to visit the facility to visually inspect for safety issues), and end the Union's right to visit the facility to investigate grievances, review operations, and meet with new employees during their orientation to discuss joining the Union. These proposals are not per se unlawful, see generally, *Frontier Hotel & Casino*, 323 NLRB 815, 818 (1997) (access), enfd. in relevant part by 118 F.3d 795 (D.C. Cir. 1997), *Logemann Bros. Co*., 298 NLRB 1018, 1020 (1990) (union security and checkoff), and *Challenge-Cook Bros*., 288 NLRB 387, 388 (1988)(union security and checkoff), but they may be evidence of bad faith if the reasons advanced for the proposal(s) are "so illogical as to warrant an inference that . . . [the employer] has evinced an intent not to reach agreement . . . in order to frustrate bargaining." *Phelps Dodge Specialty Cooper Products Co*., 337 NLRB 455, 457 (2002) (citing *Hickinbotham Bros. Ltd*., 254 NLRB 96, 102–103 (1981). See also *Tomco Communications*, 220 NLRB 636, 636 (1975), enf. denied 567 F.2d 871 (9th Cir. 1978) (an employer's "[r]igid adherence to proposals which are predictably unacceptable to the union may indicate a predetermination not to reach an agreement, or a desire to produce a stalemate in order to frustrate bargaining and undermine the statutory representative.").

As stated, the record is silent as to what, if any, reasons Respondent offered the Union for why it was advancing these proposals. However, the contents and timing of the proposals suggests an intent to frustrate bargaining. Starting in at least January 2018, Respondent unilaterally changed the contractual dues-checkoff revocation procedure and processed untimely revocations without the Union's consent and without providing the Union with prior notice and an opportunity to bargain. With its initial proposal, Respondent sought to eliminate dues checkoff entirely. Similarly, beginning in late June 2017, and continuing, Respondent barred Union agents from accessing the facility. The Union's grievance over this went to arbitration on April 25, 2018. Respondent submitted its initial proposal on May 1—a few weeks after the arbitration—and it sought to change or eliminate every contractual provision that allowed the Union agents access to the facility. The timing of those proposals, at least as it relates to Union's ability to access the facility, strikes as retaliation for the Union asserting its contractual right to access. This hint of retaliatory motive resurfaced in late January 2019, after the Union obtained a district court order enforcing the arbitration decision. Thereafter, the Union went to Respondent's facility and was again denied access. That same day, Respondent's attorney declared impasse and implemented its last, best, and final offer. Although there are no allegations Respondent made regressive or retaliatory proposals, the nature and timing of these proposals further supports that Respondent failed or refused to bargain in good faith with a sincere intent to reach a successor agreement.

[48] Par. 13 of the second consolidated complaint.

issues were. It also fails to identify what, if any, efforts it made to reach agreement on those issues. The record does not reflect that Respondent ever explained to the Union the importance of the changes it was proposing, or why it summarily rejected the Union's quid pro quo proposals addressing certain of those changes, without explanation or a counterproposal. If a party is unwilling to make any meaningful modifications to its proposals, it is in effect maintaining an impermissible "take it or leave it" approach to bargaining. *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 485 (1960).

Respondent also contends the parties were at impasse because the Union failed to accept, reject, or present a counter to Respondent's last, best, and final offer. To begin with, the proposal Respondent provided on January 2 and implemented on January 30 was not a complete proposal. It failed to include the parties' tentative agreements, and it omitted any reference to wages. The Board has held the employer's failure to provide requested information that is necessary for the union to create proposals or counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse. See *E. I. du Pont & Co*., 346 NLRB 553, 557–558 (2006); *Decker Coal Co*., 301 NLRB 729, 740 (1991). The Union withheld submitting any economic proposals, including on wages, because it was waiting on the information it had requested from Respondent. As a result, the Union was in no position to accept, reject, or counter the last, best, and final offer.

Similarly, there is no basis from which to conclude the parties both understood they were deadlocked or at the end of their ropes. Respondent never moved from its initial proposal, and it did not advise the Union as to which, if any, of its proposals it would be willing to modify or eliminate, or which of its proposals it was adamant about including in any agreement. Similarly, the Union never advised Respondent as to which, if any, of its proposals it would be unwilling to further modify or eliminate, or which of Respondent's proposals it would adamantly refuse to accept. The bottom line is the parties never got that far in their negotiations.

The Board has held that even if the parties reach a deadlock in their negotiations, a finding of impasse is foreclosed if that outcome is reached in the context of serious unremedied unfair labor practices that affect the negotiations, including failure to provide relevant information, unilateral changes to mandatory subjects of bargaining, and direct dealing. *Royal Motor Sales*, 329 NLRB 760, 762 (1999) (unilateral changes to wages serious and precluded impasse); *Great Southern Fire Protection*, 325 NLRB 9 (1997)(refusal to provide information and unilateral implementation of changes to benefits serious and precluded impasse); and *Noel Corp*., 315 NLRB 905, 911 fn. 33 (1994) (unlawful discharge and refusal to reinstate employees engaged in strike serious and precluded impasse), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996). See also *Raven Government Services, Inc*., 331 NLRB 651 fn. 3 (2000) (Board found refusal to provide requested information, unilateral changes to mandatory subjects, and direct dealing to be "serious" unremedied violations barring employer from withdrawing recognition). As explained, Respondent engaged in serious unfair labor practices that affected negotiations. As discussed below, through its commission of these serious unfair labor practices, Respondent undermined the Union as the exclusive collective-bargaining representative of the Unit, including its ability to effectively bargain.

In light of the foregoing, I find Respondent violated Section 8(a)(5) and (1) when it unlawfully implemented its last, best, and final offer, which unilaterally changed mandatory subjects of bargaining, including articles addressing dues checkoff, grievance procedures, safety, holidays, union access, and the term of the agreement, without first bargaining with the Union to an overall good-faith impasse.

Respondent further violated Section 8(a)(5) and (1) when it insisted to impasse and implemented its last, best, and final offer removing the maintenance employees from the Unit. Although parties may negotiate over non-mandatory, or permissive, subjects of bargaining, a party may not insist on those subjects to impasse. If an impasse has been created, even in part, by a party's insistence on bargaining about a non-mandatory subject, that impasse is not valid. *Retlaw Broadcasting Co*., 324 NLRB 138, 143 (1997), enfd. 172 F.3d 660 (9th Cir. 1999). An employer that bargains to impasse over, and unilaterally implements a permissive subject of bargaining, violates Section 8(a)(5). See *Antelope Valley Press*, 311 NLRB 459, 460 (1993). Unit scope is not a mandatory bargaining subject, and consequently a party may not insist to impasse on alteration of the unit. *Somerset Valley Rehabilitation and Nursing Center*, 364 NLRB No. 43, slip op. at 4 (2016) (eliminating or removing a unit classification alters the scope of the bargaining unit and, therefore, is a permissive subject of bargaining); *Idaho Statesman*, 281 NLRB 272, 275–277 (1986), enfd. 836 F.2d 1396 (1988). Here, Respondent presented the Union with its last, best, and final offer which removed maintenance employees from the Unit, then declared the parties were at impasse, and implemented that offer, in violation of Section 8(a)(5) and (1).

c. Denigrating or Undermining the Union

The General Counsel alleges that since at least January 23, 2018, Respondent made statements and engaged in conduct that violated Section 8(a)(1) and (5) of the Act—all of which has been set forth and addressed above—in an attempt to undermine or denigrate the Union as the exclusive collective-bargaining representative of the Unit.[49] The Board has found that an

[49] Par. 12 of the second consolidated complaint. Subparagraph 12(a) specifically alleges Respondent sought to undermine the Union when it: (1) made coercive statements to employees concerning continued Union representation during a March 2018 safety meeting (referring to subparagraph 5(a) of the second consolidated complaint); (2) failed to provide the Union with the presumptively relevant information since November 7, 2017 (referring to paragraph 8 of the second consolidated complaint); (3) failed to cloak its bargaining representatives with the authority to enter into binding agreements; (4) cancelled bargaining sessions at the last moment without explanation; (5) failed to make bargaining proposals and failed to provide explanations for rejections of the Union's bargaining proposals; (6) denigrated the Union in the eyes of Unit employees by statements during a March 2018 safety meeting (referring to subpar. 5(a) of the second consolidated complaint); (7) denigrated the Union in the eyes of the Unit employees by solicited employees to resign from the Union and to cease paying dues in June and July 2018 (referring

employer violates Section 8(a)(5) and (1) by disparaging of a union or by casting doubt in the minds of the membership as to the bona fides of the efforts of union representatives in advancing the interest of its members. *General Athletic Products Co*., 227 NLRB 1565, 1575 (1977). An employer's efforts to portray the employer, rather than the union, as the workers' true protector may constitute an unfair labor practice. *NLRB v. United Technologies Corp*., 789 F.2d 121, 134 (2nd Cir. 1986); *Formosa Plastics Corp*., 320 NLRB 631, 632 (1996). Additionally, an employer violates Section 8(a)(5) and (1) by conduct that undermines a representative's authority to bargain. See generally, *Outdoor Venture Corp*., 336 NLRB 1006, 1011 (2001)(direct dealing); *Grosvenor Resort*, 336 NLRB at 617 (unilateral changes in wages and benefits); *Bryant & Stratton Business Institute*, 321 NLRB at 1044 (failure to provide information); *Thill, Inc*., 298 NLRB 669, 672 (1990) (overall bad-faith bargaining), enfd. in part 980 F.2d 1137 (7th Cir. 1992).

As previously established, Respondent engaged in several of these violations, including refusing to provide the Union with requested information that was relevant and necessary for bargaining a successor agreement, coercing employees into signing nondisclosure forms related to the information the Union had requested, unilaterally changing the terms of the parties' agreement without the Union's consent and changing mandatory subjects of bargaining without providing the Union with prior notice and opportunity to bargain over those changes, direct dealing, overall bad-faith bargaining, prematurely declaring impasse and implementing its last, best, and final offer. I, therefore, find Respondent violated Section 8(a)(1) and (5) by undermining or denigrating the Union as the representative of the Unit employees.

V. Special Remedies

The General Counsel seeks certain special or enhanced remedies to address Respondent's unfair labor practices in violation of Sections 8(a)(1), (5) and 8(d) of the Act, noting that the violations are widespread, ongoing, and strike at the heart of the employees' Section 7 rights. First, the General Counsel seeks an order requiring that, at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's representative read the attached notice to the employees on work time in the presence of a Board agent. Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during work time in the presence of Respondents' supervisors and agents. The Board has recognized that notice reading is an extraordinary remedy but, in this instance, I believe it is warranted. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019). Respondent has engaged in a series of serious unfair labor practices, some of which involve supervisors and agents, including the plant manager, the operations manager, the human resource manager, and several supervisors. See *Stern Produce Co., Inc*., 368 NLRB No. 31, slip op. at 5 (2019) (citing *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice reading appropriate in part due to high-ranking responsible management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). Such serious and pervasive unlawful conduct, as described and found herein, warrants a notice reading (in English and Spanish) to reassure employees that that their employer and its managers and supervisors are bound by the Act's requirements. *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007) (and cited cases), enfd. mem. 273 Fed.Appx. 32 (2nd Cir. 2008).

Next, the General Counsel seeks an order requiring that Respondent allow the Union reasonable access to its bulletin boards and all places where notices to employees are customarily posted. The General Counsel fails to explain why this remedy is necessary. Article 5 of the parties' expired agreement--which will operate as the status quo pursuant to the remedial order at least until the parties bargain to impasse or a new agreement--requires that Respondent provide the Union with one glassed-in bulletin board for its use for approved purposes. The General Counsel fails to explain why this is inadequate and why greater access to "all places where notices to employees are customarily posted" is warranted. As a result, I deny ordering this enhanced remedy.

The General Counsel also seeks an order requiring Respondent supply the Union, on its request, the names and addresses of its current Unit employees. Again, the General Counsel does not explain why this remedy is necessary. The standard remedy in a failure to provide information case is to require the employer to provide the union with requested information that is relevant and necessary to its role as collective-bargaining representative. The Board has held the names and addresses of current unit employees is presumptively relevant. *Children's Center for Behavioral Development*, 347 NLRB 35, 49 (2006); *Helca Mining Co*., 248 NLRB 1341, 1341, 1343 (1980); and *Dynamic Machine Co*., 221 NLRB 1140, 1142 (1975), enfd. 552 F.2d 1195 (7th Cir. 1977), cert. denied 434 U.S. 827 (1977). However, there are no allegations the Union requested, and Respondent failed or refused to provide, the Union with the Unit employees' names and addresses. As a result, I deny ordering this enhanced remedy. That being said, Respondent is obligated to provide the Union with the information it requested since November 6, 2017, and Respondent has an ongoing statutory duty to bargain with the Union in good faith, including the duty to provide the Union with requested information that is relevant and necessary to the Union's role(s) as collective-bargaining representative of the Unit.

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to subpar. 5(c)(2) of the second consolidated complaint; (8) provided preprinted forms to employees to resign from the Union and revoke their dues checkoff authorizations from January through July 2018; (9) interrogated employees about their support for the Union in June and July 2018 (referring to subpar. 5(c)(3) of the second consolidated complaint); (10) coerced employees into signing pre-printed non-disclosure of confidential employment information forms from January through July 2018 (referring to subpar. 5(c)(4) of the second consolidated complaint); (11) bypassing the Union and dealing directly with employees about mandatory terms of conditions of employment in June 2018 (referring to subpar. 9 of the second consolidated complaint); (12) unilaterally changed employees' terms and conditions of employment, including wages and dues-checkoff revocations, without notice and bargaining with the Union and changed the terms of the collective-bargaining agreement without the Union's consent (referring to paragraph 10 of the second consolidated complaint); and (13) implemented its last best and final offer on January 30, 2019, before reaching a valid impasse (referring to par. 13 of the second consolidated complaint). (GC Exhs. 17 and 18). Each of these allegations has been addressed above.

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Similarly, the General Counsel seeks an order requiring Respondent to grant the Union access to non-work areas during employees' nonwork time. Although Respondent denied Union agents access to the facility, the second consolidated complaint does not allege that to be an unfair labor practice. As a result, there is no basis to order a remedy for conduct not alleged to be unlawful. I, therefore, deny ordering this enhanced remedy.

The General Counsel also seeks an order requiring Respondent to bargain on request with the Union with a bargaining representative cloaked with the authority to enter into binding agreements. That requirement is part of the standard remedy where, as here, the employer has failed or refused to bargain in good faith, including failing to designate a negotiator with the authority to bargain and enter into an agreement.

Finally, the General Counsel seeks an order that Respondent bargain on request for a minimum of 24 hours per month, each session to last a minimum of six hours, until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining.[50] Because of the pervasive and serious nature of Respondent's violations, set forth above, I believe that a bargaining schedule requiring the Respondent to meet and bargain with the Union on a regular and timely basis is appropriate and would best effectuate the purposes of the Act. See *All Seasons Climate Control, Inc*., 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), enfd. 540 Fed.Appx. 484 (6th Cir. 2013). I find that the above schedule, which will promote regular meaningful bargaining between the parties, to be appropriate here. I shall also require the Respondent submit written bargaining progress reports every 30 days to the compliance officer for Region 14, and to serve copies on the Union. Id.[51]

CONCLUSIONS OF LAW

1. Respondent, Noah's Ark Processors, LLC d/b/a WR Reserve, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers Local Union No. 293, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the certified exclusive collective-bargaining representative, within the meaning of the Section 9(a) of the Act, of an appropriate unit of employees consisting of the following (hereinafter the "Unit"):

> All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

4. At all material times, Mike Helzer, Paul Hernandez, Chris Kitch, Lidia Acosta, Joel Murillo, Jose Madrigal, Karen Mendoza, Josue Guerrero, Clay Irish, Maruylys Castillo Cisnero, and Luis Prado have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

5. At all material times, Dinora Murillo and Mary Junker were agents of Respondent within the meaning of Section 2(13) of the Act.

6. On about March 27, 2018, Respondent, through Paul Hernandez and Mike Helzer, threatened employees with termination for engaging in protected, concerted activities, told employees they were terminated for engaging in protected, concerted activities, and threatened to call the police because the employees engaged in protected, concerted activities, in violation of Section 8(a)(1) of the Act.

7. On various dates since January 23, 2018, Respondent, through Lidia Acosta and Dinora Murillo, coerced employees into signing pre-printed forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent, in violation of Section 8(a)(1) of the Act.

8. On various dates since January 23, 2018, Respondent has failed to remit employee dues to the Union pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations, in violation of Section 8(a)(1) of the Act.

9. In about early November 2018, Respondent, through Paul Hernandez, Joel Murillo, Jose Madrigal, and Josue Guerrero, interrogated employees about their Union and/or Board activities, in violation of Section 8(a)(1) of the Act.

10. In about early November 2018, Respondent, through Paul Hernandez, Joel Murillo, and Jose Madrigal, required employees to meet with and/or use attorneys retained and compensated by Respondent prior to and when meeting with Board agents, in violation of Section 8(a)(1) of the Act.

11. In about early November 2018, Respondent, through Paul Hernandez, told employees they were required to use Respondent's paid attorneys when meeting with the Board's agents and stated they were required to use the Respondent's paid attorneys to meet with the Board's agents because Respondent didn't want employees to be confused speaking to the Board agents or use a word that he didn't know how to use properly, in violation of Section 8(a)(1) of the Act.

12. On about March 27, 2018, Respondent terminated employees Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, because they engaged in protected, concerted activities by collectively requesting from Respondent explanations of wage discrepancies and demanding a wage increase, in violation of Section 8(a)(1) of the Act.

13. Since November 6, 2017, and continuing, Respondent has repeatedly failed or refused to provide the Union with all of the requested information related to Unit employees' wages, hours, and terms and conditions of employment, which is both relevant and necessary to the Union's role as collective-bargaining representative, in violation of Section 8(a)(5) and (1) of the Act.

[50] This is consistent with the terms of the bilateral informal Board settlement Respondent entered into to resolve the allegations in Case 14–CA–217400.

[51] The General Counsel also seeks an order requiring Respondent reimburse the discriminatees for all search-for-work and work-related expenses regardless of whether the discriminatees received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period. That is part of the standard remedy involving the discharge of individuals for engaging in statutorily protected activities.

14. In about late June 2018, Respondent, through Mike Helzer, Paul Hernandez, Chris Kitch, Clay Irish, Karen Mendoza, Marulys Castillo Cisneros, Joel Murillo, Luis Prado and Jose Madrigal, bypassed the Union and dealt directly with Unit employees by soliciting their preferences about moving the observance of the Independence Day holiday from July 4, 2018 to July 6, 2018, in violation of Section 8(a)(1) and (5) of the Act.

15. Since about January 23, 2018, Respondent unilaterally began changing the Unit employees' hourly wage rates and began paying them wages contrary to the parties' collective-bargaining agreement, without notice and bargaining with the Union over the decision or its effects, and without the Union's consent, in violation of Sections 8(a)(1) and (5) and 8(d) of the Act.

16. Since about January 23, 2018, Respondent unilaterally began failing and refusing to deduct and remit to the Union dues pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations, without notice and bargaining with the Union over the decision or its effects, and without the Union's consent, in violation of Section 8(a)(1) and (5) and 8(d) of the Act.

17. Since about January 23, 2018, and through the present, Respondent has been attempting to undermine the Union by failing to provide the Union with presumptively relevant information related to Unit employees' terms and conditions of employment; failing to cloak its bargaining representatives with the authority to enter into binding agreements; canceling bargaining sessions at the last moment without explanation; failing to make bargaining proposals and counterproposals; failing to provide explanations for rejections of the Union's bargaining proposals and counterproposals; denigrating the Union in the eyes of Unit employees; coercing employees into signing non-disclosure of confidential employment information forms; directly dealing with employees about mandatory terms of conditions of employment; unilaterally changing employees' terms and conditions of employment without notice and bargaining with the Union and changing the terms of the parties' collective-bargaining agreement without the Union's consent, including those prematurely implemented pursuant to Respondent's last, best and final offer, in violation of Section 8(a)(1) and (5) of the Act.

18. Since about March 2018, through the present, Respondent has been failing and refusing to bargain in good faith with the Union by failing to provide the Union with the presumptively relevant information related to bargaining unit employees' terms and conditions of employment; failing to cloak its bargaining representatives with the authority to enter into binding agreements, cancelling bargaining sessions at the last moment without explanation; failing to make bargaining proposals; failing to provide explanations for rejection of the Union's bargaining proposals; denigrating the Union in the eyes of Unit employees; coercing employees into signing pre-printed nondisclosure of confidential employment information forms; directly dealing with employees about mandatory terms of conditions of employment; unilaterally changing employees' terms and conditions of employment without notice and bargaining with the Union and changing the terms of the parties' collective-bargaining agreement without the Union's consent, including those prematurely implemented pursuant to Respondent's last, best and final offer, in violation of Section 8(a)(1) and (5) of the Act.

19. On about January 30, 2019, Respondent declared impasse and implemented its last, best and final collective-bargaining proposal addressing mandatory subjects of bargaining, such as dues checkoff, grievance procedure, safety, holidays, union access, and term of agreement, without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement, in violation of Section 8(a)(1) and (5) of the Act.

20. On about January 30, 2019, Respondent insisted to impasse and implemented its last, best and final collective-bargaining proposal containing a permissive subject of bargaining, in violation of Section 8(a)(1) and (5) of the Act.

21. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

22. Consistent with this decision, I recommend dismissing the remaining allegations.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(1) of the Act when it terminated Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, Respondent shall offer them each full reinstatement to their former jobs or, if their former position no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and to make each whole for any loss of earnings and other benefits suffered as a result of the discrimination suffered. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate each for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Additionally, Respondent shall be required to compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, Respondent shall rescind and remove from its files any reference to these terminations in its files, and to notify these employees in writing that this has been done and that these terminations will not be used against them in any way.

Having found that Respondent violated Sections 8(a)(5) and 8(d) of the Act unilaterally changed terms and conditions of

employment for Unit employees, Respondent shall, on request, rescind those changes and retroactively restore any unilaterally modified terms and conditions of employment. Respondent shall bargain in good-faith with the Union as the exclusive collective-bargaining representative of Unit employees before implementing any changes in wages, hours, or other terms and conditions of employment of Unit employees. Respondent also must make whole the Unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

Having found that Respondent violated Section 8(a)(5) of the Act by prematurely declaring impasse and unilaterally implementing its last, best, and final offer on January 30, 2019, without bargaining with the Union to a good-faith impasse, and changing terms and conditions of employment for Unit employees thereafter, as well as implementing a permissive subject of bargaining, Respondent shall, on request, rescind the changes in terms and conditions of employment implemented on January 30, 2019, and retroactively restore all terms and conditions of employment as they existed prior to the January 30, 2019 implementation of that offer, and to the extent consistent with the terms of this Order. Respondent also shall make whole the unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

Having directly dealt with bargaining unit employees over mandatory subjects of bargaining, Respondent shall cease and desist from engaging in such behavior in the future.

Having failed to deduct and remit dues to the Union pursuant to valid, unexpired, and unrevoked employee dues checkoff authorizations, Respondent shall honor checkoff provisions in the parties' collective-bargaining agreement and valid dues-checkoff authorizations filed with it. Respondent also shall make the Union whole for any dues that it failed to deduct and transmit pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations, with interest. Interest shall be computed in accordance with New Horizons, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall also reimburse Unit employees for any expenses ensuing from failure to make required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), with interest as computed above. Respondent also shall preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze the amount due under the terms of this Order.

Having failed to provide the Union with presumptively relevant information related to Unit employees' terms and conditions of employment since November 6, 2017, Respondent shall provide the Union with all information it requested in writing on November 6, 2017, and on subsequent dates.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union, Respondent shall be ordered to meet at reasonable times and in good faith with the Union as the exclusive bargaining representative of its employees in the above described bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody the understanding in a written agreement. Due to Respondent's refusal to designate an authorized negotiator with authority to enter into binding agreement, delay in scheduling or cancelling bargaining sessions, failure to submit proposals and counterproposals, failure to provide explanations for rejecting the Union's proposals and counterproposals, and overall failure to meet and bargain in good faith with the Union, a bargaining schedule requiring Respondent to meet and bargain with the Union on a regular and timely basis is appropriate and would effectuate the purposes of the Act. See *All Seasons Climate Control, Inc*., 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), enfd. 540 Fed. Appx. 484 (6th Cir. 2013). Upon the Union's request, Respondent shall be required to bargain for a minimum of 24 hours per month, each session to last a minimum of six hours, until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining. Respondent shall also be required to submit written bargaining progress reports every 30 days to the compliance officer for Region 14, and to serve copies of those reports on the Union.

Respondent shall post the attached Notice to Employees in English and Spanish in all places where Respondent normally posts notices and keep all Notices posted for 60 consecutive days. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Respondent also shall hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a responsible management official of Respondent will read the Notice in English and Spanish, in the presence of a Board agent. Alternatively, Respondent also shall hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a Board agent read the Notice in English and Spanish, in the presence of Respondents' supervisors and agents.

In the event that during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 6, 2017. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 14 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

[52] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Noah's Ark Processors, LLC d/b/a WR Reserve, at its Hastings, Nebraska facility, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain in good-faith with the Union as the designated collective-bargaining representative of all Respondent's production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act (hereinafter the "Unit").

(b) Threatening employees with termination for engaging in protected, concerted activities; telling employees they were terminated for engaging in protected, concerted activities; and threatening to call the police because the employees engaged in protected, concerted activities.

(c) Coercing employees into signing pre-printed forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent.

(d) Failing to deduct and remit employee dues to the Union pursuant to valid, unexpired, and unrevoked employee dues checkoff authorizations.

(e) Interrogating employees about their Union and/or Board activities.

(f) Requiring employees to meet with and/or use attorneys retained and compensated by Respondent prior to and when meeting with Board agents.

(g) Telling employees that they were required to use Respondent's paid attorneys when meeting with the Board's agents and stated they were required to use the Respondent's paid attorneys to meet with the Board's agents because Respondent didn't want employees getting confused or using a word they didn't know how to use properly when meeting with Board agents.

(h) Discharging employees because they engaged in protected, concerted activities, including collectively protesting wage discrepancies and demanding a wage increase.

(i) Failing or refusing to provide the Union with all of the requested information related to Unit employees' wages, hours, and terms and conditions of employment, which is both relevant and necessary to the Union's role as collective-bargaining representative.

(j) Bypassing the Union and directly dealing with Unit employees by soliciting their preferences about moving the observance of the Independence Day holiday.

(k) Unilaterally changing Unit employees' wages, hours, and other terms and conditions of employment without providing the Union with notice and bargaining to a good-faith impasse over those changes and/or their effects.

(l) Changing the Unit employees' hourly wage rates and begin paying them wages and failing to deduct and remit to the Union dues pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations, contrary to the parties' collective-bargaining agreement, without the Union's consent.

(m) Attempting to undermine the Union by failing to provide the Union with presumptively relevant information related to Unit employees' terms and conditions of employment; failing to cloak its bargaining representatives with the authority to enter into binding agreements; canceling bargaining sessions at the last moment without explanation; failing to make bargaining proposals; failing to provide explanations for rejections of the Union's bargaining proposals; denigrating the Union in the eyes of Unit employees; coercing employees into signing non-disclosure of confidential employment information forms; directly dealing with employees about mandatory terms and conditions of employment; unilaterally changing employees' terms and conditions of employment without notice and bargaining with the Union and changing the terms of the parties' collective-bargaining agreement without the Union's consent, including those prematurely implemented pursuant to Respondent's last, best, and final offer.

(n) Failing and refusing to bargain in good faith with the Union by failing to provide the Union with the presumptively relevant information related to bargaining unit employees' terms and conditions of employment; failing to cloak its bargaining representatives with the authority to enter into binding agreements, cancelling bargaining sessions at the last moment without explanation; failing to make bargaining proposals; failing to provide explanations for rejection of the Union's bargaining proposals; denigrating the Union in the eyes of Unit employees; coercing employees into signing pre-printed non-disclosure of confidential employment information forms; directly dealing with employees about mandatory terms of conditions of employment; unilaterally changing employees' terms and conditions of employment without notice and bargaining with the Union and changing the terms of the parties' collective-bargaining agreement without the Union's consent, including those prematurely implemented pursuant to Respondent's last, best, and final offer.

(o) Declaring impasse and implementing its last, best, and final collective-bargaining proposal addressing mandatory subjects of bargaining, such as dues checkoff, grievance procedure, safety, holidays, union access, and term of agreement, without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

(p) Insisting to impasse and implementing its last, best, and final collective-bargaining proposal containing a permissive subject of bargaining.

(q) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and take those additional as set forth in the remedy section of this decision.

(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit employees before implementing any changes to their wages, hours, or other terms and conditions of employment.

(c) On request, rescind the unilateral changes made to Unit employees' terms and conditions of employment, such as wage rates and dues-checkoff authorization, without the Union's consent and without bargaining with the Union to a good-faith

impasse, retroactively restore those unilaterally modified terms and conditions of employment, and take those additional steps as set forth in the remedy section of this decision.

(d) On request, rescind the changes in terms and conditions of employment for Unit employees implemented on January 30, 2019, retroactively restore those unilaterally modified terms and conditions of employment as they existed prior to the January 30, 2019 implementation of that offer, and take those additional steps as set forth in the remedy section of this decision.

(e) Honor dues-checkoff provisions in the parties' collective-bargaining agreement and valid dues-checkoff authorizations filed with it and make the Union whole for any dues that it failed to deduct and transmit pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations, and take those additional steps as set forth in the remedy section of this decision.

(f) Provide the Union with presumptively relevant information related to Unit employees' terms and conditions of employment that it requested in writing on November 6, 2017, and on subsequent dates.

(g) Bargain for a minimum of 24 hours per month, each session to last a minimum of six hours, until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining. Respondent shall also be required to submit written bargaining progress reports every 30 days to the compliance officer for Region 14, and to serve copies of those reports on the Union.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, and within 3 days thereafter, notify the employees in writing that this has been done and that the termination of assignment will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 14 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Hastings, Nebraska facility copies of the attached notice marked "Appendix."[53] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted in English and Spanish by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, those notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent also shall hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a responsible management official of Respondent will read the Notice in English and Spanish, in the presence of a Board agent. Alternatively, Respondent also shall hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a Board agent read the Notice in English and Spanish, in the presence of Respondents' supervisors and agents.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 11, 2019.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with the United Food and Commercial Workers Union Local 293 (the Union), as the exclusive collective-bargaining representative of all production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act, working at the Hastings, Nebraska facility.

WE WILL NOT coerce you into signing non-disclosure of employment information forms.

WE WILL NOT threaten you with termination or threaten to call the police on you if you engage in protected concerted activities such as raising concerns about wage disparity.

WE WILL NOT tell you we are terminating you for engaging in protected concerted activities such as raising concerns about wage disparity.

WE WILL NOT ask you about whether you received subpoenas from the National Labor Relations Board (Board).

WE WILL NOT require that you meet with attorneys paid for by us related to Board investigations.

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT tell you that you are required to use the attorneys we paid for when you meet with Board agents.

WE WILL NOT make coercive statements to you about your potential testimony to Board agents.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities such as raising concerns about wage disparity.

WE WILL NOT bypass the Union and deal directly with you over mandatory terms and conditions of employment, including the observance of a holiday.

WE WILL NOT refuse to provide the Union with presumptively relevant information

WE WILL NOT fail to deduct and remit Union dues pursuant to valid dues deduction authorizations.

WE WILL NOT unilaterally change your wage rates and/or pay you wage rates contrary to the collective-bargaining agreement.

WE WILL NOT make statements or engage in conduct that undermines the Union's role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective bargaining representative of our unit employees.

WE WILL offer Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed.

WE WILL make Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to the unlawful discharges of Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, and within 3 days thereafter notify those individuals in writing that this has been completed and their discharges will not be used against them in any way.

WE WILL, upon request by the Union, rescind unilateral changes made to employees' wage rates and the deduction and remittance of dues to the Union

WE WILL notify the Union in writing that this has been done.

WE WILL, upon request of the Union, rescind all changes in terms and conditions of employment implemented on January 30, 2019 and restore all terms and conditions of employment as they existed prior to the January 30, 2019 implementation, and WE WILL make whole employees adversely affected by the January 30, 2019 implementation, with interest.

WE WILL beginning with the next scheduled bargaining session for the purpose of negotiating a successor collective-bargaining agreement with the Union, utilize a negotiator at the table with authority to bind the Respondent.

WE WILL bargain with the Union in sessions to be held for a minimum of 24 hours per month, each session to last a minimum of six hours, until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining.

WE WILL reimburse the Union for the losses resulting from our failure to deduct and remit dues since January 23, 2018.

WE WILL resume deducting and remitting dues to the Union unless and until such time as employees revoke their authorization for automatic dues deduction pursuant to the terms set forth in the employees' dues checkoff authorizations.

NOAH'S ARK PROCESSORS, LLC D/B/A WR RESERVE (EMPLOYER)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-217400 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.